No. 458



IN THE

# *Supreme Court of the United States*

October Term, A. D. 1940

**EMANUEL E. LARSON,**
Petitioner,

vs.

**PACIFIC MUTUAL LIFE INSURANCE COMPANY,**
Respondent.

Petition for Certiorari to the Supreme Court of Illinois.

## Petition for Writ of Certiorari

CHARLES M. HAFT,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

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# Petition for Writ of Certiorari

TO THE HONORABLE, THE JUSTICES OF SAID COURT:

Your petitioner presents this his petition to this court for a writ of certiorari to the Supreme Court of the State of Illinois, and in support thereof respectfully shows:

1. Your petitioner, with others, on August 11, 1935, filed a Complaint in the Superior Court of Cook County, Illinois, charging that a certain Rehabilitation and Reinsurance Agreement entered into between Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California and Pacific Mutual Life Insurance Company, and approved by an Order of the Superior Court of Los Angeles County, California, was illegal and void, and prayed the Court to so determine and prayed in the alternative for a judgment for money damages to be satisfied out of a mortgage made by The Pacific Mutual Life Insurance Company of California upon property in Cook County, Illinois, which mortgage was in

the possession of Chicago Title and Trust Company, and further prayed for general relief (Rec. 1-8).

2. That in said Complaint it was alleged that The Pacific Mutual Life Insurance Company of California had in the State of Illinois in the hands of Chicago Title and Trust Company a real estate mortgage for $250,-000.00, and prayed for and obtained an injunction restraining the disposition of said mortgage.

3. Said Complaint prayed among other things that said mortgage be held as long as any liability exists upon petitioner's policy.

4. The Complaint also shows that petitioner is a resident of Illinois (Rec. 1).

5. That petitioner's cause of action is predicated upon a Non-Cancellable Disability Policy appearing in the Record at pages 8 to 16, issued to him on the 5th day of August, 1921, in the State of Minnesota, by The Pacific Mutual Life Insurance Company of California, upon his application made therefor in the State of Minnesota (Rec. 2). The terms of this policy do not subordinate the rights of petitioner under his policy in and to the assets of the Company to those of any other policy or policies (Rec. 8-16).

6. The Insurance Commissioner of California filed his petition in the Superior Court of Los Angeles County, California, naming The Pacific Mutual Life Insurance Company of California, sole respondent.

7. (Rec. 63-67) In his petition, the Commissioner alleged that the Company was insolvent within the meaning of the Insurance Act, and alleged that it was advisable that said Commissioner be appointed to work out a Rehabilitation and/or Reinsurance plan concerning the Corporation, and asking authority to forthwith take title and possession of all of respondent's books, property and assets, and that he be appointed conserva-

tor of said Corporation; that while the said petition and the petition subsequently filed, asking the approval of a plan presented, had the appearance of a proceeding to conserve the Company assets, and to protect all of its policy holders, in fact its real purpose, as developed and shown by the plan presented by the Commissioner, was to protect the life policies of said Company only, at the expense of the Non-Can Disability Policy Holders and to give the old company stockholders the right to acquire the new company stock. The Commissioner was appointed Conservator on the same day that he filed his petition (Rec. 61).

8. It appearing that the Judge who entered the Order last aforesaid was a policy holder in said Company, an Order was entered by another Judge on the 11th of August, 1936, reappointing the Commissioner Conservator, and on the 17th day of August, 1936, said Commissioner filed his Petition (Rec. 75) in the Superior Court of Los Angeles County, California, in which he alleged among other things (Rec. 76) that in 1918 said Insurance Company started issuing its so-called Non-Cancellable Income Disability Policies (hereinafter referred to as Non-Can Policies); that by reason of actuarial under calculation said Non-Can Policies were issued by the Old Company on an entirely inadequate premium rate and as later experience developed said premium so paid would be insufficient to pay the losses incurred thereon; that although in subsequent years said premium rates were increased, further experience disclosed that even at said increased rates said premiums were not sufficient to maintain the reserves necessary to mature the policy obligations.

9. The petition further alleged (Rec. 77) that in excess of sixty per cent (60%) of the insurance business written by said Company was conducted in states other than California; that said Commissioner caused to be

organized under the laws of California, a new Corporation known as Pacific Mutual Life Insurance Company and transferred thereto from the funds of the Old Company coming into his hands as Conservator the sum of $3,000,000.00 in payment of all of its capital stock; that on the same date he transferred to said New Company all of the other assets formerly as of July 22, 1936, held by the Old Company or by himself as Conservator, except the stock in the New Company and rights or claims which the Old Company might have against any of the present or past officers, directors or employes; that since July 22, 1936, the Commissioner as Conservator acting through the New Company formed by him has carried on the Old Company business (Rec. 78); that in his opinion of the various offers of rehabilitation and reinsurance, the plan proposed by him is the best and by said plan proposed to rehabilitate the Old Company, through the medium of the New Company, by reinsuring in the New Company, without limit, all of the insurance business (other than Non-Can Policies) of the Old Company.

10. Within a few days after his appointment as Conservator, the Commissioner presented a Rehabilitation and Reinsurance Contract, along with his petition, asking the Court's approval thereof (Rec. 79) in which he alleged that no plan of rehabilitation or offer of reinsurance has been presented which affords to the policy holders of the Old Company the measure and opportunity of protection provided for in the Agreement presented by him.

11. That in fact no new capital was put into the New Company, but the sole method sought to be employed by the Commissioner for rehabilitation purposes was to destroy from ten to eighty per cent of the beneficial value of the Non-Can Policies by impairing the obligation of the contract embodied in said policies, as more

fully appears from the Rehabilitation and Reinsurance Agreement (Rec. 132); that while the property of your petitioner was taken for the benefit of the life policy holders, no compensation was paid to him on account of the reduction in the benefits due under his policy from $500.00 per month to $100.00 per month.

12. That the contract of Rehabilitation and Reinsurance obligated the New Company to reinsure all life policies to the extent of one hundred per cent (100%) of the benefits which the Old Company had obligated itself to pay, and that such full reinsurance extended also to a large number of life policies carrying disability features of the same nature as those of your petitioner without any reduction whatever in the amounts payable under the Reinsurance plan on the one hand or increase of premiums payable on the other (Rec. 124).

13. That a man of large financial means by the name of Giannini proposed to the California trial court to take over the Old Company business and assets and to start payment on Non-Can Policies at 50 per cent of the face amount of the benefits provided thereby to be paid and provide for restoring said benefits in accordance with a plan proposed and to put into said insurance business a large amount of new capital. Said plans would not have left in the hands of said conservator any stock in the company formed to take over the Old Company business assets and policy liability; that said plan would not have made it possible for the Old Company stockholders acting through the Old Company to have acquired the stock of the New Company as provided by the Rehabilitation and Reinsurance Agreement, but said Giannini plan would have been far more advantageous to Non-Can policyholders, than is the plan embodied in said Rehabilitation and Reinsurance Agreement; that to permit the Old Company stockholders to benefit at

the expense of the Non-Can policyholders is contrary to the public policy of the State of Illinois.

14. That your petitioner's policy is numbered 4619175 and falls within the first group shown at page 132 of the Record, and has the rights against company assets as any other policy (Rec. 8-18).

15. That by the terms of the Rehabilitation and Reinsurance Agreement policy holders who did not elect to accept the terms thereof were relegated to an alternative of filing claims with the Commissioner within seventy-five (75) days from the approval of the Rehabilitation and Reinsurance Contract, but such claims must be proved to the satisfaction of the Liquidator (Rec. 147).

16. By the Rehabilitation and Reinsurance Agreement, the New Company was obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of the Agreement (July 22, 1936), but it was under no obligation for benefits for disability commencing after said date.

17. The stockholders in the Old Company invested no capital in the New Company, but there is reserved to them, through the Old Company, the right to purchase from the Conservator all of the New Company stock (Rec. 144) without any limitation as to the time of purchase instead of requiring said stock to be sold for the benefit of Non-Can policyholders thereby rendering said agreement and proceedings unfair and inequitable contrary to the public policy of the State of Illinois. (*Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106.)

18. The Record further shows (page 183) that out of a total of 211,806 life insurance policies in force on December 31, 1938, 116,000 of said policies carry as a feature thereof disability provisions similar in character

to the provisions of the policy of petitioner, but said 116,000 policies so carrying said disability provisions are not subject to any reduction in the payment of benefits, but under the Rehabilitation and Reinsurance Agreement (Rec. 132), to which no policyholder is a party, one of said life policies carrying a \$500.00 per month disability provision, would in case of his disability receive \$500.00 per month; petitioner whose policy calls for the payment of \$500.00 per month in case of disability would if disabled receive \$100.00 per month; another holder of a disability policy of like form but issued in 1932-1935, calling for a \$500.00 monthly payment in case of disability would receive \$450.00 per month; that the rights of petitioner are not, under the terms of his policy subordinated to the rights of any other policy (Rec. 8-18).

19. That petitioner was never served with process in the State of California and never entered his appearance in the proceedings in the Superior Court of Los Angeles County, California, and in no wise participated in said proceedings. That no person or persons were named defendants in the Insurance Commissioner's proceedings except The Pacific Mutual Life Insurance Company of California (Rec. 55).

20. That your petitioner's policy was numbered 4619175 and called for a monthly disability payment of \$500.00 (Rec. 8-11) and an annual premium payment of \$170.00 (Rec. 16), and falls in the first group shown at page 132 of the record.

21. The Pacific Mutual Life Insurance Company presented a motion to the Superior Court of Cook County asking that the injunction restraining the disposition of the \$250,000.00 mortgage be dissolved, and that the Complaint, as amended, be dismissed (Rec. 190).

22. The Court granted the motion to dissolve and ordered that as a matter of equity and by reason of the

pendency of this proceeding, upon payment of any unpaid premiums, the Pacific Mutual Life Insurance Company reinstate petitioner's policy pursuant to the terms and conditions of the Rehabilitation and Reinsurance Agreement (Rec. 194).

23. The Court also found that petitioner is bound by the terms and conditions of the Rehabilitation and Reinsurance Agreement which had been pleaded in bar and dismissed the Complaint (Rec. 193).

24. That petitioner's physical condition is such that he cannot obtain any new insurance in any insurance company (Rec. 253).

25. Petitioner shows unto the Court that the decision of the California Supreme Court here involved is reported in *Carpenter* v. *Pacific Mutual Life Insurance Co.*, 10 Cal. (2d) 307, and that on appeal to this Court said cause was heard in *Neblett* v. *Carpenter*, 305 U. S. 297.

26. Petitioner alleges that this Court has jurisdiction to grant the writ of certiorari herein prayed for pursuant to Section 8 of the Judicial Code (Session Laws, 1925, page 940) and shows unto the Court as reason therefor and assigns as error committed by the Illinois Supreme Court, and as grounds for the issuance of said writ, and the reversal of the judgment of the Supreme Court of Illinois, the following:

(a) The trial court and the Supreme Court in turn committed error in giving full faith and credit to the various California proceedings concerning rehabilitation and reinsurance in the mistaken belief that the Federal Constitution demanded such action without exception, whereas if said California proceedings were without jurisdiction or are in violation of the Federal Constitution or are contrary to the public policy of the State of Illinois, which in fact is the case, full faith and credit should not be given thereto, and shows unto the

Court that inasmuch as your petitioner, his insurance policy, and the $250,000 mortgage were not in the State of California, but were within the State of Illinois, the California Court was without jurisdiction of the person of petitioner, his policy or said mortgage; that while the California authorities might deal with persons and property within the State of California, they could not deal with and modify the terms of the insurance policy of petitioner located in the State of Illinois; that the only power to take your petitioner's policy or destroy to the extent of eighty percent. (80%) the benefits payable thereunder, is the power of eminent domain, which cannot be exercised by a State as to property lying without the State, said proceedings are therefor without jurisdiction and not entitled to full faith and credit.

(b) That in sustaining the Order of the Superior Court of Los Angeles County, California in approving of the contract by the terms of which, your petitioner's benefit payments are to be decreased from $500.00 a month to $100.00 a month without any reduction whatsoever in the payment of premiums, the Supreme Court of California held that such reduction was made in the exercise of the State's police power, which is contrary to the public policy of Illinois, as manifested by Section 13 of Article 2 of the Constitution of Illinois, providing that private property shall not be taken for public use without just compensation, and Section 2 of Article 2 of said Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law, and Section 14 of Article 2 of said Constitution prohibiting the impairment of the obligation of contracts; that the applicable provisions of the Federal Constitution and the decisions of the Supreme Court of the United States relative thereto are a part of the public policy of Illinois, and that the Fifth

Amendment to the Federal Constitution provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation; that Section 1 of the Fourteenth Amendment to the Federal Constitution likewise provides that no person shall be deprived of property without due process of law, and also provides that no state shall deny to any person within its jurisdiction the equal protection of the laws; that section 10 of Article 1 of the Federal Constitution provides that no state shall pass any law impairing the obligation of contracts; that both the Supreme Court of the United States and the Supreme Court of Illinois, in giving effect respectively to the Federal and State Constitutions, have held that private property may not be taken or damaged in the exercise of the police power.

(c) That petitioner's contract of insurance is a Minnesota Contract into which is written the law of Minnesota, and not a California Contract, and any attempt of California to modify that contract by her law is lacking in due process of law contrary to Section 2 of Article 2 of the Illinois Constitution, and the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the Federal Constitution, and impairs said Minnesota Contract in violation of Section 10 of Article I of the Federal Constitution all of which constitute a part of the public policy of the State of Illinois.

(d) That it appears that the only authority claimed as the basis for the action of the Commissioner of Insurance of California, is Paragraph 1043 of Chapter 145 of the California Sessions Laws of 1935, which grants authority to the Commissioner, subject to the approval of the Court, "and subject to the liens as may be necessary to mutualize or reinsure the business of such person or enter into rehabilitation agreements." This language does not authorize the Commissioner

to single out a class of policies issued by a particular company and decrease the benefits payable under an insurance policy by the terms thereof, and thereby impair the obligation of such contract which leaves the rehabilitation and reinsurance agreement without due process of law, contrary to the provisions of the Illinois and Federal Constitutions hereinbefore referred to, and consequently contrary to the public policy of the State of Illinois. If on the other hand, the language of said statute is to be construed as authorizing the impairment of the obligation of insurance contracts, then said statute is in violation of both the Illinois and Federal constitutional provisions pertaining to the impairment of contracts hereinbefore referred to, and is for that reason contrary to the public policy of the State of Illinois.

(e) If the statute in question is to be construed as giving the Commissioner of Insurance the right to do whatever he may please with reference to rehabilitation and reinsurance contracts, including the impairment of contracts of insurance, if he sees fit, the legislature is then surrendering to the Commissioner its legislative functions contrary to Article III., of the Constitution of Illinois, and therefore contrary to the Illinois public policy.

(f) If we take Paragraph 1043 of the California Insurance Code as authorizing the impairment of plaintiff's insurance contract to the extent of eighty percent. (80%), resulting in the impairment thereof, then said statute is contrary to Section 14 of Article 2 of the Illinois Constitution, and contrary also to Section 10 of Article 1 of the Federal Constitution, hence contrary to the public policy of the State of Illinois.

(g) The Rehabilitation and Reinsurance Agreement does not benefit the public of California generally, and inasmuch as sixty percent. (60%) of the business of

the Company is done outside of California, it is to the benefit, to that extent, of persons who are not citizens of California. Said contract benefits only certain classes of the policy holders in a single Company doing business in California, and is, therefore, for private benefit and not for public benefit, and hence not in the exercise of the police power. And inasmuch as the Supreme Court of California bases its opinion solely on the proposition that it is an exercise of the police power, and that proposition not being tenable, petitioner's property is taken and damaged without due process of law, contrary to the provisions of both the Federal Constitution and the Constitution of the State of Illinois hereinbefore referred to, and consequently contrary to the public policy of the State of Illinois.

(h) The contract in question, as approved by the Court, leaves wholly undisturbed the life policy benefits, although in a large number of instances the life policies carry the same disability benefits covered by petitioner's policy, and destroys the benefits of certain classes of disability policies in varying degrees less than that to which petitioner's policy is subjected. In some instances, the impairment amounted to only ten percent. (10%). Said California proceedings fail to afford to petitioner the equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution, which is a part of the public policy of the State of Illinois.

(i) Paragraph 1043 of the Insurance Code of California of 1935 is in violation of the Fifth Amendment to the Federal Constitution and void.

Paragraph 1043 of the Insurance Code of California of 1935 is in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and void.

Paragraph 1043 of the Insurance Code of California of 1935 is in violation of Section 10 of Article 1 of the

Federal Constitution and void, thereby rendering all of said contract provisions absolutely void.

Inasmuch as said California proceedings are based solely on the last aforesaid section and said section is void said proceedings are likewise void and without jurisdiction, or due process and are not entitled to recognition in the State of Illinois.

(j) Considered as a proceeding *in rem* to take in part from petitioner his policy contract, the California Courts and authorities had no jurisdiction over the *res,* because its situs and actual location was that of its possessor in Illinois, and all of said proceedings are therefore without due process of law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and the Fifth Amendment to the Federal Constitution, and section 2 of Article II of the Illinois Constitution and are not therefor entitled to full faith and credit in Illinois.

(k) The California proceedings, to which the Illinois Courts were called upon to accord full faith and credit, take private property without just compensation, in violation of the Fifth Amendment to the Federal Constitution, and impair the obligation of petitioner's insurance contract in violation of Section 10 of Article 1 of the Federal Constitution, and deprive petitioner of his property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution, and deny to petitioner the equal protection of the laws contrary to said Section 1 of the Fourteenth Amendment to the Federal Constitution, and for each and all of said reasons said California proceedings are void and not entitled to full faith and credit in the State of Illinois.

(l) It is not contended that petitioner was named as a party to the California proceedings or that he was

personally served therein or that he ever entered his appearance therein, although the effect of the California proceedings were *in personam* in that they affect his personal rights as a holder of the policy in question but not his possession thereof, and are therefore without due process of law in violation of the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Federal Constitution.

(m) It is not contended that petitioner was named as a party to the California proceedings or that he was personally served therein or that he ever entered his appearance therein, although the effect of the California proceedings were *in personam* in that they affect his personal rights as a holder of the policy in question, contrary to the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Federal Constitution, and Section 2 of Article 2 of the Constitution of Illinois, all of which are part of the public policy of Illinois, thereby rendering said California proceedings contrary to such public policy and not entitled to full faith and credit in Illinois.

(n) Insofar as the Illinois Insurance Act of 1937 can be said to be retroactive and to deprive petitioner of the right to establish a preferred claim against the Illinois assets of The Pacific Mutual Life Insurance Company of California, said Act destroys vested rights and impairs the obligation of petitioner's insurance policy in violation of Section 10 of Article 1, and Section 1 of the Fourteenth Amendment to the Federal Constitution, and is therefore void.

(o) The judgment of the Supreme Court of Illinois, in holding that the 1937 Insurance Code, destroying petitioner's remedy against the Old Company and its Conservator, and reversing the judgment of the trial court, thereby denying the relief granted by the trial

court without remanding the case for a hearing on the merits upon petitioner's claim for damages for a breach of his insurance contract, was construing said Insurance Code in a manner that renders it clearly in violation of Section 10 of Article 1 of the Constitution, and the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Federal Constitution; that petitioner's remedy is a part of the obligation of his insurance contract; that both the Old Company and its Conservator are parties to the suit in the Superior Court of Cook County (Rec. 1-21) and are within the jurisdiction of said Court, and subject to any judgment that might have been or may be entered against them or either of them in said Court; that if the judgment of the Superior Court of Cook County, Illinois, is not reversed, and petitioner sues the Old Company and its Conservator, or either of them in the State of California, which is the only place where he can get service upon them, he will, in all probability, be met with the contention that his only remedy in that State was to file his claim with the Conservator within seventy-five days of the Order approving the Rehabilitation and Reinsurance Agreement, which time has long since elapsed, and consequently petitioner is without remedy in the State of California which, as aforesaid, is the only State in which he can obtain service upon either the said Old Company or said Conservator, or liquidator hence the said Insurance Act, construed as it is by the Supreme Court of Illinois, impairs the obligation of petitioner's contract and destroys his contract rights and all remedy thereon, all of which is contrary to the public policy of Illinois.

26. Petitioner respectfully shows unto the Court that it is only by the issuance by this Court of its writ of certiorari to the Supreme Court of Illinois, and a decision of the questions here presented upon their merits, that petitioner's rights accorded by the Constitution of the United States can be preserved.

Wherefore your petitioner prays that this Court cause to be issued its writ of certiorari directed to the Supreme Court of Illinois, commanding it to transmit to this Court a transcript of its proceedings, to the end that this Court may review the same and may, upon such hearing, reverse and remand the judgment of said Court with directions as this Court may adjudge.

EMANUEL E. LARSON,
*Petitioner,*

By CHARLES M. HAFT,
*His Attorney.*

(Petitioner is filing an appendix hereto setting forth comments on the contract in question in order to devote his brief in support solely to questions of law.)

## APPENDIX.

### Comments on the Terms of the Contract.

(Rec. 133) Paragraph 14 is the Paragraph of the Agreement in question that deals with the subject of restoration of benefits under Non-Can Policies. Among the provisions therein contained are the following:

> "The New Company shall from time to time transfer from funds available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can Policies."

There is no provision, however, for the establishment of a general corporate purpose fund that gives any indication of funds being available for transfer. (Rec. 134.)

This transfer is to be made in such manner as the Board of Directors, with the approval of the Commissioner, may from time to time determine.

The amounts of transfers are to be such as the Board of Directors, in its discretion, shall determine to be *not* reasonably required for the reasonable, proper and *profitable* conduct of the operations of the New Company as a going concern. In short, profits come before restoration of benefits to Non-Can Policies.

There is a further provision that at the time of the examination, the Commissioner may order further funds transferred "to the extent such additional funds available for general corporate purposes are in his opinion available without interfering with the proper and profitable conduct of the business of the New Company as a going concern."

Here again, profits take precedence over restoration of benefits to Non-Can Policies, and under any and all

circumstances a transfer of funds is impossible, except to the satisfaction of the Commissioner.

These monies are to go into a special fund to be used by the New Company "with the approval of the Commissioner and in such manner as he may from time to time require for the purpose of paying additional disability benefits, etc."

To give a further air of plausibility of restoration of benefits, there is a provision for the payment of three and one-half percent. ($3\frac{1}{2}\%$) interest per annum on the amounts restored.

Then follows the provision: "The extent and manner of the restoration so required or approved by the Commissioner shall be binding up on all holders of Non-Can Policies and all other persons interested therein." (Rec. 134.)

There is a provision that the New Company, with the approval of the Commissioner, *may* fully assume and reimburse all Non-Can Policies hereby partially and conditionally reinsured to the full amount thereof.

Then follows a provision that when the Commissioner shall determine that in his opinion the amount of the special fund contains adequate reserves for full insurance, he may order such transfer and full reinsurance.

Is it reasonable to assume that the Commissioner will in the future treat the Non-Can Policyholders more fairly and equitably than he treated them by the terms of the Contract in question, by which, as to some Non-Can Policies, as much as eighty percent. (80%) of the benefits are destroyed for the advantage and profit of other types of policies, who had no greater legal rights under their policies, in the Company assets than had the Non-Can Policies?

In order that there might not be too much of a chance

of restoration of benefits to Non-Can Policies, the Contract provides (Rec. 134):

> "The New Company shall be under no obligation to pay or restore the full benefits under Non-Can Policies as originally provided therein, except in the manner and to the extent hereinbefore described."

Again, we find in the Contract (Rec. 134, 135), the provision:

> "that if title to all or substantially all of the assets of the Accident and Health Department of the New Company shall thereafter be transferred, by voluntary act (other than by statutory merger or consolidation) or by operation of law, to any person who does not in connection with such transfer assume all of the obligations of the New Company to holders of Non-Can Policies, including obligations to restore the benefits thereunder in substantially the manner in this paragraph 14 provided, then and in that event the New Company will be deemed to have fully reinsured and assumed all of the Non-Can Policies, including the obligations to pay in full all installments of the disability benefits originally provided to persons theretofore entitled thereto."

It is thus to be seen that if a statutory merger or consolidation takes place, there is no reinsurance by the New Company.

What the nature and the financial responsibility of the merging and consolidating Company may be, or the terms or conditions of the merger, are shrouded in doubt and uncertainty.

There is even no obligation on the part of the New Company, in case of merger or consolidation, to see to it that the Company resulting from the merger or consolidation, is obligated to restore the benefits to Non-Can Policyholders.

It would be quite permissible, under the language above referred to, to dispose of all of the assets of the New Company, which have not been allocated to the Accident and Health Department, and thereby deprive itself of the means otherwise specified in the Agreement for restoration of liability on Non-Can Policies.

While the New Company agrees to pay claims against the Conservator or Liquidator (Rec. 136-137), the Agreement does not obligate the New Company to pay the claim of any claimants, unless and until they are filed with and approved to the satisfaction of the Commissioner and allowed by him.

This provision, of course, clearly has a tendency to try to force Non-Can Policyholders who do not accept insurance in the New Company and who reside outside of California, to abandon any attempt to establish their claims in their own domicile and go to the trouble and expense of establishing such claim before the Commissioner as he may be *satisfied* to allow them (Rec. 137).

Even when claims are filed and established to the satisfaction of the Liquidator, the New Company is under no obligation to pay them in full, except as provided in Paragraph 14.

As the contract provides (Rec. 137):

> "(c) Any remaining amount necessary to pay any discharge the claims as aforesaid shall be paid at the time that benefits under Non-Can Policies are fully restored."

The Contract in question reads in part (Rec. 139):

> "In the event benefits under Non-Can Policies shall not theretofore have been fully restored as provided in Paragraph 14 hereof."

Then follows a provision with reference to the Liquidator paying money, derived from assets in his hands, to the New Company.

It is thus to be observed that the Rehabilitation and Reinsurance Agreement itself expresses a doubt that the provisions of Paragraph 14 will result in restoration of benefits.

At pages 140-145 of the Record, Paragraph 20, is found a provision providing for mutualization, which is so ambiguous that it leaves it doubtful as to what would become of the monies paid for stock in case of mutualization, although there is a provision in Paragraph 19 of the Agreement (Rec. 138) whereby the Conservator binds himself and any Liquidator that the proceeds of any assets received shall be used in the manner in Paragraph 19 provided.

Sub-Paragraph (b) of Paragraph 20 (Rec. 143) provides that if at any time prior to the expiration of the option to mutualize, a plan of merger, consolidation, reorganization or reinsurance of the New Company is presented which, in the opinion of the Directors of the New Company, cannot be consummated without the elimination of the mutualization provisions, then by means in said Paragraph provided, the mutualization features of the Contract may be eliminated.

It is apparent that the only tangible means that the Conservator had for the payment of claims allowed by him to his satisfaction was the stock of the New Company held by him, but even these means are subject to nullification by the terms of Sub-Paragraph (d) (Rec. 145), which provides that when the conservator or liquidator shall determine that conditions are such as to require the sale of the stock "for the protection of the estate in conservation or liquidation, the New Company, or its Policyholders, he may sell the same upon order of the Court made after a proper showing, etc."

It is thus to be observed that Non-Can Policyholders, who establish claims in any manner or proceeding other

than by allowance to the satisfaction of the Commissioner, are left wholly unprotected. Thus petitioner must prevail in the proceeding instituted by him in the Superior Court of Cook County or not at all.

Then follows a queer provision found in Sub-Paragraph (e) (Rec. 145):

> "It is the purpose, spirit and intent of this Agreement that unless the provisions for mutualization are eliminated pursuant to the provisions of Sub-Paragraph (b) of this Paragraph 20, the stock of the New Company shall not be sold or disposed of prior to restoration of benefits under Non-Can Policies, except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue;"

Here the Liquidator and the New Company express their doubt as to the restoration of benefits proving successful.

While the New Company makes no unqualified Agreement to restore the benefits under Non-Can Policies, it, nevertheless, does enter into such unqualified Agreement so far as its assumption of the Old Company contracts with its insurance agents is concerned, as is evidenced by Paragraph 21 of the Agreement (Rec. 145, 146).

It is thus to be seen that the Insurance Commissioner puts the Agents of the Old Company, who probably for years made their living and more out of the Old Company, above the Non-Can Policyholders.

We understand it to be the policy of all insurance laws to protect policyholders and in endeavoring to protect the Old Company agents above the Non-Can Policyholders, the Contract is contrary to the public policy of Illinois, as evidenced by its insurance laws.

It is not improbable that many Non-Can Policyholders will consider the treatment sought to be accorded to

them under the terms of the Rehabilitation and Reinsurance Agreement so unfair and dishonest, that they will have no further dealings with either the Old Company or the New Company, but will drop their policies. When added to the policies so lapsed, we take those lapsed by the death of policyholders and by others reaching the age limit of 66 and thereby lapsing the policy under its terms, there will undoubtedly come a time when there will be but little money required to restore benefits under Non-Can Policies, and it is evidently that such time was in view that the Commissioner caused to be written into the Contract Sub-Paragraph (c) of Paragraph 20 (Rec. 144) by the terms of which at any time while the stock of the New Company is held by the Conservator or Liquidator, the Old Company shall have the right to pay to the Conservator or Liquidator the full amount *then* required by the New Company to complete the restoration of Non-Can benefits, and also the amount required by the Conservator or Liquidator to complete the payment of all his claims and liabilities.

Then follows the further provision that when all liabilities are satisfied "the Conservator or such Liquidator shall upon the order of Court distribute the stock then held by him in the manner provided by law."

It is to be observed that the Old Company has not been dissolved, and any assets such as the New Company stock would become the property of the Old Company and in turn would, under this provision, be distributed to the Old Company stockholders.

The California Supreme Court said in its opinion that the Old Company could not cut down the benefits due on Non-Can Policies, but we see that by a circuitous method, the Insurance Commissioner has performed this kind service for the Old Company, and at little or perhaps no expense to it turned over the stock in the New

Company, which gives it and its stockholders in turn the entire ownership and control of the New Company.

How many years it will be necessary to keep the Non-Can Policyholders who survive this ordeal out on a limb before the law can be circumvented, it is impossible to say, but suffice it to say that the trial court finds such procedure is fair, just and equitable (Rec. 120-121). We contend that this stock feature renders the contract fraudulent in law.

This Court had occasion to pass upon a situation where rehabilitation proceedings were, like those before this Court, so conducted as to give to the Old Company stockholders an advantage in the way of stock other than that represented by cash put into the Company for the purpose of rehabilitating.

We refer to *Case, et al.* v. *Los Angeles Lumber Products Company, Limited,* 308 U. S. 106.

While the case above referred to is a statutory one in bankruptcy, as this Court notes in the decision above referred to, the rule is the same in equity, and the fair and equitable requirement does not admit of the stockholders of the Old Company having any interest in the reorganization, except such as they justly acquire by. putting new capital in to rehabilitate the Company.

We refrain from quoting any of the Opinion of Your Honors in the case last referred to, in the belief that it is sufficiently fresh in your minds to make such quotation unnecessary.

It is quite true that the trial court, in approving the Rehabilitation and Reinsurance Contract, made a finding that adequate provision had been made for restoration of Non-Can Policies. At most that finding is a guess, and that guess is predicated on the obligations contained in the Agreement itself. However the meaning and effect of the agreement is for this court to

determine for itself when, as here, the question of the impairment of the obligation of a contract, in violation of the Federal Constitution, is concerned.

It is to be noted that while a "New Company" was formed, no new capital went into that Company. Conversely, the capital and surplus of the New Company was magnanimously furnished by the Insurance Commissioner, acting as Conservator, out of the funds of the Old Company. If, as the Commissioner contends, the Old Company was insolvent, the New Company is necessarily insolvent also, if, as is now contended, the New Company has obligated itself to assume all Policies of the Old Company, even if the New Company is given time within which to "restore" the Non-Can Policies.

It is to be observed that the Commissioner, neither acting as Conservator nor Liquidator is obligated to use the capital stock of the New Company for the purpose of restoring benefits under Non-Can Policies, or paying claims filed with him and allowed.

As we read between the lines, restoration is to take place in a method not expressed in the phraseology of the Rehabilitation and Reinsurance Agreement.

In the course of human events, Non-Can Policyholders are bound to die from time to time and by the terms of these Policies (Record 9), no liability arises thereon by reason of such death unless it is occasioned through accidental means. Death from sickness creates no liability under the Policy. The Policy, itself, however, dies when its holder becomes 66 years of age, and his rights on account of future disabilities are then and there terminated in all particulars.

It seems to us, therefore, that the only definite means of restoring Non-Can benefits to any policy will be through the death of other holders of like policies or

by the expiration of such policies. When either of such events happens with sufficient frequency, the policy holders in the Old Company are given a chance to step in and avail of the results through the medium of a purchase by the Old Company of the New Company stock. (Record 144.)

We submit that had the Commissioner entertained a *bona fide* desire to treat the Non-Can Policyholders fairly, he would have seen to it that the Old Company Stockholders ~~Policyholders~~ put sufficient money into either the Old Company of the New Company to make it reasonably certain that all policies, both Life and Non-Can, should receive fair and equal treatment.

There is not a word in the Non-Can Policy (Record 8-16) that subjects the holder thereof to the rights of any other type of policyholder, so far as participating in the entire assets of the Old Company is concerned.

If the Non-Can Policyholders were not by the terms of their policies called upon to pay sufficient premiums to mature those policies, the fault lies with the officers of the Old Company and the Insurance Commissioner of California who had supervision over the rates established. Nevertheless, the Non-Can Policyholders and they alone are by the Agreement in question (to which they are not parties) required to pay the cost of the error made in establishing premium rates.

Petitioner, who took out his policy in 1921, is required to pay this cost on the basis of eighty percent. (80%) thereof, although he had already paid to the Company premiums for a period of fifteen years, but another Non-Can Policyholder, who took out his policy in 1935, and who had paid but one premium, was required to contribute on the basis of ten per cent (10%) only, to meet the cost of error on premium rates. Life policyholders, even those whose policies embodied the same

disability features as those in petitioner's policy, are not required to contribute in the slightest degree to remedy this premium rate error, and still the trial court finds that this Rehabilitation and Reinsurance Contract is fair and equitable.

To use the language of the trial court's Order (Record 115, Par. 4),

> "Adequate provision is made for each and every class of policyholders, creditors and stockholders of respondent corporation and all other persons interested in the respondent corporation." * * *
>
> And (Record 115) "That neither said Agreement, nor the plan therein embodied, discriminates unfairly or illegally in favor of any class of policyholders, creditors, stockholders or other persons interested in respondent corporation,"
>
> (Record 116) "8. Said Rehabilitation and Reinsurance Agreement and the plan embodied therein, are, and each of them is, fair, just, and equitable."

We have endeavored to ascertain when, how, and where, petitioner has anything granted to him in the Rehabilitation and Reinsurance Agreement attaining a remote relationship to a remedy for the $400.00 per month, which said Agreement attempts to take from him. May he sue at the end of five years for $400.00 per month for any period of disability occurring within that time? If so, who may he sue? May he sue in Illinois? May he sue in California?

Hypothetically, the Non-Can policyholder has in the first ten-year period following the effective date of the Agreement been continually disabled. He holds a $500.00 policy paying under the Agreement but twenty per cent of the benefits provided for by his policy. Assume, that at the end of this ten-year period, none of the $400.00 of benefits have been restored.

The Commissioner and the New Company tell him that there are no funds available under the terms of the Agreement because, if you please, the New Company has not operated at a profit, such as the New Company and the Commissioner had in mind in entering into the Agreement.

May the policyholder then sue? If so, who may he sue, and for how much may he sue?

If the Commissioner accords the same type of treatment to Non-Can policyholders of the first group shown at page 132 of the Record, to which group petitioner belongs, as he is there shown to have meted out to said group, and treats that group with the same consideration in the matter of the restoration of benefits, which is largely left to the action of his unbridled will, and having in mind that by the terms of the Rehabilitation and Reinsurance Agreement he accorded to that group twenty per cent of the benefits specifically and unqualifiedly provided to be paid to them by the terms of their policies, which policies did not subordinate their rights to those of any other policies, so far as the assets of the Old Company were concerned, what will he do to them now where, instead of having a vested payment of $500.00 per month in case of disability, the procedure for restoration is nebulous and uncertain and subject to the will of the Commissioner on the one hand and that of the Board of Directors of the New Company on the other. What remedy is left for this group that can be enforced in an action at law?

We submit that it may be well said here, as was said elsewhere, "Leave all hope behind Ye who enter here."

The situation here presented is not different in principle from that involved in *Railroad Company* v. *Tennessee,* 101 U. S. 237, where the State had consented to be sued in a court of law for the purpose of ascertain-

ing the amount due to one claiming to be a creditor, but the only power given to the court was to fix the amount as, in the Rehabilitation and Reinsurance Agreement, in the case of petitioner the amount of benefits to be restored is fixed at $400.00 per month. In the case referred to, the Court was given no authority to enforce the collection of the amount found by it to be due. Your Honors there said:

> "Everything after the judgment depends upon the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a legal remedy in the legal sense of the term which can only be carried into effect by entreaty."

So in the case here presented, performance is left to the will of the Commissioner and the will of the Directors of the New Company. If they do not will to restore, there is no remedy in a legal sense because petitioner is left to depend solely on entreaty.

Fangle...



No. 458

311

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940

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|---|---|
| EMANUEL E. LARSON, Petitioner, vs. PACIFIC MUTUAL LIFE INSURANCE COMPANY, Respondent. | Petition for Certiorari to the Supreme Court of Illinois. |

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

CHARLES M. HAFT,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

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CONSTITUTIONAL PROVISIONS:

*Federal*:

IN THE

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

At the threshold of the consideration of the petition herein, Your Honors may be inclined to inquire, why should we hear this matter, in view of our decision in *Neblett* v. *Carpenter,* 305 U. S. 297, and we believe that we should therefore point out the difference between the case presented in *Neblett* v. *Carpenter,* and the case presented by the petition herein.

There are four questions presented here that could not have been raised in this court on the hearing of the certiorari to the Supreme Court of California. They are,

1. The Illinois Courts erred in determining the meaning of Section 1 of Article 4, providing that full faith and credit shall be given in every State to the public acts, records and judicial proceedings of every other State.

The State Courts failed to give heed to the exceptions

that were pointed out to the effect that full faith and credit should not be given where there was a lack of jurisdiction in the foreign State or a lack of due process or where the foreign proceedings are contrary to the public policy of the State of Illinois.

2. The insurance policy of petitioner was entered into in the State of Minnesota, and the laws of Minnesota were in effect written into it and became a part of it, and it is not within the province of the State of California, by its laws or proceedings, to modify or impair the Minnesota contract in a manner contrary to the laws of that State.

3. The effect of the judgments of the Illinois Courts was to impair the obligation of petitioner's contract in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution, in denying him a right to establish a preferred claim against the assets of a foreign insurance company which were situated in the State of Illinois, before the Company would be permitted to remove said assets from this State, which preferred claim it was the public policy of Illinois to enforce; that the Illinois Court so construed a provision of an insurance act passed in 1937, about one year after petitioner had instituted his proceedings in the Superior Court of Cook County, Illinois, to establish his claim and have it declared a preferred claim against the assets of the foreign company in the State of Illinois, as to destroy the right of such a preferred claim as against an insurance company. Said Illinois Courts denied to petitioner all right to be heard touching his claim in the State of Illinois, which constituted a lack of due process in violation of the Fifth Amendment to the Federal Constitution and also Section 1 of the Fourteenth Amendment to the Federal Constitution.

It seems that the Illinois Supreme Court does not re-

nounce its long line of decisions establishing the general doctrine of Illinois assets for Illinois creditors where a foreign owner of assets is involved, but it does seem that the clear force and effect of that Court's opinion is to make an exception in the case of insurance policy creditors, thereby denying to the last mentioned claims of creditors the equal protection of the law in defiance of Section 1 of the Fourteenth Amendment to the Federal Constitution.

4. The California proceedings were in effect *in personam* in that they attempted to determine the amount that should be payable to petitioner under his insurance policy, although he was a resident of the State of Illinois and his insurance policy was located in the State of Illinois, and no personal service was had upon him in the State of Illinois, nor did he enter his appearance in the California proceedings. Furthermore, California would have no jurisdiction to carry on a proceeding *in rem* involving the policy of petitioner, which was at all times in the State of Illinois, and without the jurisdiction of the State of California.

Aside from these matters, however, the judgment of the California Court was expressly based squarely and solely on the State's exercise of the police power in impairing the obligation of the Non-Can policies. Said judgment was based upon the further proposition that while the impairment was in derogation of the Federal Constitution, the police power of California was exempt from the provisions of the Federal Constitution.

This petition unquestionably would not be before Your Honors had counsel presenting the last petition called to your attention that in *Carpenter* v. *Pacific Mutual Life Insurance Company,* 10 Cal. (2d) 307, which was involved in the former petition, the California Court said:

> "The old company was powerless to change the existing Non-Can policies. The contract and due

process clauses prohibited the Company from making any changes therein, but these prohibitions do not apply to the State acting under its police powers."

This Court is too familiar with the provision of Section 10 of Article 1, to have failed to note instantly that it is the State, as distinguished from individuals, to which Section 10 applies, and any member of this court could undoubtedly have called to mind, without any citation from counsel, one of the numerous cases in which you have held that the police power of the State is subject to the applicable provisions of the Federal Constitution, and having done so, you would undoubtedly have reversed the California Court. *Panhandle Co.* v. *Highway Commission,* 294 U. S. 613-18 is one of such cases.

Section 2 of Article 6 of the Federal Constitution, as Your Honors well know, provides that the Federal Constitution and all laws enacted pursuant thereto, shall be the supreme law of the land, thereby constituting in effect an express denial of the assertion of the California Court, to which we have just made reference.

We will, in the course of this brief, cite in this connection decisions of this Court, as well as decisions of the Supreme Court of Illinois, holding the police power of the State is subject to the applicable provisions of the Federal Constitution.

So far as we can determine from the opinion of this Court, you were made to unconsciously hold, in effect, that the police powers of a State are not subject to the contract and due process clauses of the Federal Constitution because you were induced to approve by your opinion of what the California Court said in its opinion, and in so doing overruling a long line of decisons theretofore rendered by this Court. Naturally, this Court ruled upon such questions, and only such questions, as

were properly presented to it and were found to be within your jurisdiction.

We fail to observe that the prior certiorari was prosecuted in a very vigorous or exhaustive manner.

Counsel well knew that it was their duty and not that of this Court to search for error claimed to exist and point it out and invite a ruling upon it. Then, and not until then, the duty of this Court begins.

One matter that challenges attention is why petitioner Neblett, the holder of a life policy, should desire the overthrow of the Rehabilitation and Reinsurance Agreement in question, which gives him 100 per cent of insurance, whereas petitioner herein is accorded only 20 per cent, as a result of which what is taken away from petitioner and any other Non-Can disability policyholders is, in effect, given to life policyholders, inasmuch as any decrease in liability of the Company naturally increases correspondingly the assets to which the life policyholders have resort for the payment of the full amounts payable under the terms of their life policies.

Again, we fail to see where there can be any harmony of purpose between the disability policyholders and this life policyholder with whom they join, unless it be that they all belong to the class under the terms of the Rehabilitation and Reinsurance Agreement who retained almost as large a percentage of benefits as did the life policies. As will be noted (Rec. 132) some disability policies retain 90 per cent of the benefits of the policies as written. They in such case, of course, would benefit in a large measure along with the life policies by cutting down petitioner's policy to 20 per cent. In such situation naturally none of such petitioners would be interested in bringing up a full Record, because they would all benefit by having the Rehabilitation and Reinsurance Agreement sustained, rather than overthrown, and

would consequently desire that this Court sustain the judgment of the Supreme Court of California.

As this Court takes note in its opinion at page 299,

> "In the Court below contentions were made under the equal protection clause of the Fourteenth Amendment.
>
> But neither the reason stated in support of the petition, nor the assignments of error in this Court present any question under that clause."

The equal protection clause of the Federal Constitution is one principally relied upon in the petition here presented.

Even if the impairment proceedings were said to be one to take or damage petitioner's insurance policy in whole or in part, and hence a proceeding *in rem,* again the California Court would have no jurisdiction, because the *res* was and is in Illinois and not in California.

These questions, of course, were not presented to this court in *Neblett* v. *Carpenter,* and could not have been presented. Although the California proceedings were contrary to both the Federal Constitution and the Constitution of Illinois, which become pertinent matters of inquiry here in determining the public policy of the State of Illinois, and in consequence thereof impelling a refusal of the Illinois Courts to give full faith and credit to the California proceedings.

We ask this Court to correct the error of the Illinois Courts giving to the California proceedings full faith and credit.

One direct constitutional question arises in a ruling made by the Illinois Courts concerning the right of petitioner to a preferred claim against the $250,000 mortgage, belonging to the Old Company, and located in Illinois, on the 11th day of August, 1936, when these proceedings were instituted in the Superior Court of Cook County, Illinois, which was before the Rehabilitation

and Reinsurance Agreement had been approved by the Superior Court of Los Angeles County, California.

It does not admit of dispute that the public policy of Illinois is to accord preferred claims to Illinois citizens against the assets of a foreign debtor situated in Illinois.

It is contended that in 1937, or about one year after the suit here pending was instituted to establish said preferred lien, by a revision of the Illinois Insurance Laws the right to a preferred lien in insurance matters was taken away. In short, it was contended, by the Supreme Court of Illinois, the Act of 1937 was retroactive, although it did not purport to be so, and we contend that if it did purport to be so, it destroyed the vested right of petitioner to a preferred claim, and was, to that extent, at least, void, because in violation of both the Federal and State Constitutions.

By an appendix to the petition for certiorari herein, we endeavor to analyze the Rehabilitation and Reinsurance Contract and point out wherein it evidences not only uncertainty in the payment of claims, but also in the restoration of benefits to the Non-Can policies, if the holders thereof should elect to submit to the impairment of the obligation of their contracts in the hope of the restoration of the amount so impaired.

We trust that we make it quite clear by our analysis of that contract that all types of policies, except the Non-Can policies, are protected 100 per cent; that even the old stockholders of the Company are protected by an opportunity to take over from the Conservator the new company stock, which would reinstate them in practically the same position they were before the proceedings were instituted by the Commissioner of Insurance of California, contrary to a recent decision by this Court hereinafter referred to.

In *Neblett* v. *Carpenter,* 305 U. S. 302, you said in substance,

State Court's ruling that Code authority to Commissioner of Insurance to delegate power to a corporation organized by him in aid of his administration, was proper; also

State Court's ruling that the authority conferred by the Code on the Commissioner to enter into Rehabilitation and Reinsurance Agreements, is authorized by the Code; also

State Court's ruling that Code unconstitutionally delegates legislative function to Commissioner; also

State Court's ruling that Commissioner did not violate statute concerning fraudulent conveyances; are matters of state law, of which the Federal Courts have no jurisdiction.

(303) Contention that alternative of filing claims was not available because no Liquidator had been appointed not well taken.

This Court holds that inasmuch as the record does not contain the evidence but only the judgment roll, it felt bound to follow the California Court's finding that the contract of rehabilitation and reinsurance made adequate provision for all classes of policies, and does not discriminate unfairly or illegally against any class of policyholders. Hence, the Supreme Court did not rule on this question.

Unquestionably, had the California proceedings taken note of the fact that no class of policies were given any greater rights to the assets of the Old Company than any other class, and had the proceedings in California thereupon decreased in equal percentages the amounts payable under all policies, no policyholder would have any cause for complaint, but petitioner, whose policy does not subordinate his rights to those of any other

policy (Rec. 8-16) has his policy reduced to 20 per cent in order that the life policies may be maintained unimpaired at 100 per cent, and that too, although it appears that a large percentage of them carry disability features of a character of those embodied in petitioner's policy.

This means, of course, the invocation of the equal protection clause of the Fourteenth Amendment.

While this question is not a direct one as in the case of an appeal or certiorari involving the judgment of the California Court, nevertheless, it is involved in the public policy of the State of Illinois, which is made up of the applicable provisions of the Federal Constitution, together with its own Constitution and laws.

It is now sought to demand of the Illinois Courts that by force of Article 4 of the Federal Constitution, they give full faith and credit to this California decision, having back of it the apparent approval of this Court.

Both State and Federal Constitutions are involved in determining whether the California proceedings are entitled to full faith and credit in Illinois, in view of the fact that they are contrary to the public policy of Illinois.

Both the Illinois trial court and the Illinois Supreme Court fails to take note of the many exceptions to the Federal constitutional provision, that the several States shall accord full faith and credit to the proceedings of other States there specified.

This full faith and credit question necessarily was not present in *Neblett* v. *Carpenter,* and the error of the Illinois Courts in determining in the case here presented, the full faith and credit question, is here assigned as one of the grounds for reversal.

Of course, it is not in the province of this Court to reverse the Supreme Court of California in a decision in this proceeding.

We ask, however, that you correct the error of the Supreme and the trial courts of Illinois giving full faith and credit to California proceedings that are contrary to the public policy of Illinois, including as it does the applicable provisions of both the State and Federal Constitutions, and require the trial court to proceed to a hearing of the case upon its merits without being bound by the decisions of the California Court in regard to the validity of the Rehabilitation and Reinsurance Agreement in question, which the California Court, in effect, says violates the Federal Constitution, but that California is not bound by said Constitution.

In the trial court, petitioner prayed that the California proceedings should be held not to affect his policy, and in the alternative that he be awarded such damages as he might establish by reason of the refusal of the Old Company to longer recognize his policy as in full force and effect, and also asked for general relief.

The granting of any of the relief prayed for would not affect the status of any other policyholder. There is an abundant fund retained within the jurisdiction of the Illinois trial court to satisfy any judgment, be it for specific performance or for damages that the trial court might award.

We point out how even the Agents of the Old Company are protected a full 100 per cent by the contract imposing upon the New Company an obligation to take over all of their agency contracts.

We point out that a large percentage of the life policy contracts, which carry also the disability features which alone are embodied in the disability contract of petitioner, are accorded payment of 100 per cent of benefits, both life and disability.

We point out how some disability policyholders are allowed to retain 90 per cent of the benefits called for by

their policies, if they accept reinsurance in the New Company, whereas petitioner is only allowed to retain 20 per cent of the benefits provided for by his policy, should he accept reinsurance in the New Company.

We point out that no policy of any type is, under the terms of the policy of your petitioner, accorded any greater rights in or to the assets of the Old Company than is your petitioner.

Clearly, giving some policies 100 per cent of the benefits provided for, and giving to others 20 per cent only, is not equal protection of the law, and is impairing the obligation of petitioner's contract and leaving all others unimpaired.

Clearly giving one set of policies the option to take, insurance in the New Company paying 100 per cent benefits or filing a claim for damages with the liquidator on the one hand, and giving to another set of policyholders, having equal rights in the Company assets, the option to take insurance in the New Company paying only 20 per cent of the benefits provided for in its policy or filing a claim with the liquidator for damages, does not afford equal protection of the law, because while either one may file a claim for damages, only one may take insurance paying 100 per cent, a right which is wholly denied to the Non-Can policyholders.

To state the matter more briefly 20 per cent does not equal 100 per cent and unless what is accorded to each set of policyholders, is equal to what is accorded to another set it can not be said that all policyholders, who all have equal rights to company assets, are accorded equal protection of the law.

We have thus endeavored to outline in the beginning of this brief the questions hereinafter presented.

We have endeavored to prepare this brief so that Your Honors may be able to pass upon the Petition by read-

ing this preliminary outline of the brief and the matter set up under Points and Authorities. In case we have not in these two parts of this Brief given to Your Honors enough to satisfy your minds that the Petition should be granted, we have followed up with an argument on each of the Points. Your Honors may or may not care to make reference to one or more of the Points argued.

The Points upon which we desire to place emphasis is that the Insurance Act of 1937, as construed by the State Supreme Court, clearly impairs petitioner's vested right,

(*a*) To establish a preferred claim against the Illinois assets of the Insurance Company;

(*b*) To have a money judgment for the amount of damages occasioned by the breach of petitioner's policy contract.

However, this question will not arise if Your Honors conclude, as we endeavor to point out, that the California proceedings, which attempt to modify petitioner's policy contract by changing the obligation thereof from a one hundred per cent payment of benefits to a twenty per cent payment, with the mere possibility of a later restoration of benefits, is an action *in personam* requiring personal service upon petitioner in California to give to the California proceedings jurisdiction, and we particularly rely in this regard upon this Court's decisions in,

*Bank of Jasper* v. *First National Bank,* 258 U. S. 112.

*Denny* v. *Bennett,* 128 U. S. 489, 97.

*Lovell* v. *St. Louis Mutual Life Insurance Company,* 111 U. S. 264.

*Pennoyer* v. *Neff,* 95 U. S. 714.

Again, we particularly urge that the California proceedings are in violation of Section 10 of Article I of

the Federal Constitution, and Section 1 of the Fourteenth Amendment to the Federal Constitution, in that to state it most mildly, the remedy on the insurance contract is radically modified and seriously impaired by the terms of the Rehabilitation and Reinsurance Agreement.

Again, petitioner is denied the equal protection of the law, because, while he, like all other policyholders, are, by the terms of their policies, entitled to the payment of one hundred per cent of the amounts provided to be paid thereby, and no policyholder has any preference over another policyholder, regardless of the type of insurance, in the satisfaction of his policy demand against the assets of the Company. All other classes of policies are in the first instance given the option of taking a policy paying one hundred per cent or file a claim for damages, whereas the only option given to petitioner is to take a policy paying twenty per cent or file a claim for damages.

This case to review which this petition is prosecuted is reported in *Larson* v. *Pacific Mutual Life Insurance Company,* 373 Ill. 614.

The California decision is reported in *Carpenter* v. *Pacific Mutual Life Insurance Company,* 10 Cal. (2d) 307, and was reviewed by this Court in *Neblett* v. *Carpenter,* 305 U. S. 297.

## POINTS AND AUTHORITIES.

### I.

**All other questions aside, petitioner is entitled to maintain his suit in the Superior Court of Cook County, Illinois, to prove the amount of his claim and to have that claim established as preferred against the $250,000 mortgage in question and satisfied therefrom accordingly.**

*It is the public policy of Illinois that one of its citizens who has a claim against a foreign debtor may have that claim satisfied out of the property of that debtor, in the State of Illinois, before said property or the residuum thereof may be removed from the State.*

*Woodward, et al.* v. *Brooks, et al.,* 128 Ill. 222.

*Woodbury* v. *The United States Casualty Company, et al.,* 284 Ill. 227, 235.

*J. R. Smith, et al.* v. *Lamson Bros. & Co.,* 184 Ill. 71.

*Townsend* v. *Coxe, et al.,* 151 Ill. 62.

*A. D. Juilliard & Co.* v. *May,* 130 Ill. 87.

*Sercomb* v. *Catlin, Receiver,* 128 Ill. 556, 562.

*American Bonding and Casualty Company* v. *Chicago Bonding and Insurance Company, et al.,* 226 Ill. App. 475, 490.

*Judy* v. *Evans,* 109 Ill. App. 154.

*The Federal Courts have subscribed to the principle of the above mentioned rule.*

*Pennoyer* v. *Neff,* 95 U. S. 714, 720.

*Clark* v. *Willard,* 294 U. S. 211.

*Lovell* v. *St. Louis Mutual Life Insurance Company,* 111 U. S. 264.

*A court in which property is located may exercise jurisdiction over that property by enjoining its removal, and when that is done the property is withdrawn from the jurisdiction of all other Courts.*

*Pennington* v. *Fourth National Bank,* 243 U. S. 269.

*Lion Bonding Company* v. *Karatz,* 262 U. S. 277.

*Where an insurance company has turned over most of its assets and its business to another company, the person insured therein may sue the old company in the State where it has a deposit and establish his damages and collect them out of that deposit.*

*Lovell* v. *St. Louis Mutual Life Insurance Company,* 111 U. S. 264.

*The endeavor to destroy petitioner's vested right to a preferred claim by a statute enacted after it became vested, impairs that vested right in violation of Section 10 of Article 1 of the Federal Constitution. A claimant against an insurance company has a right to protect his claim in Illinois even if the Company is in receivership in another State so long at least as no action is taken by the Insurance Director to take possession of the Company's assets in this State.*

*Bastian* v. *Modern Woodmen,* 166 Ill. 595.

*Dale* v. *Hancock,* 363 Ill. 222.

*Dale* v. *Hancock,* 282 Ill. App. 70.

*The fact that no attempt is made in this case to interfere with the foreign insurance company's business in this State and no Receiver has been appointed of its assets in this State, distinguishes it from People* v. *Niehaus, 356 Ill. 104.*

*If either the 1937 or the 1929 act were to be construed as the Courts of Illinois seem to construe them, it would*

*render those acts in violation of Section 10 of Article 1 of the Federal Constitution.*

*Treigle* v. *Acme,* 297 U. S. 189.

*In construing a contract or statute in passing on the question of impairment this court adopts a construction independent of that of the State Court.*

*Panhandle Co.* v. *Highway Commissioners,* 294 U. S. 613, 18.

*After a right or cause of action has become vested, any act that impairs that vested right violates Section 10 of Article 1 of the Federal Constitution.*

*Walker* v. *Whitehead,* 83 U. S. 314.

(An act passed barring a vested cause of action on notes unless taxes had been paid on the notes held void.)

*Osborn* v. *Nicholson,* 80 U. S. 654.

(A warranty that a slave sold would be a slave for life held valid, notwithstanding the constitutional prohibition abolishing slavery.)

*W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426.

(A judgment was procured and a fund due under a life policy garnisheed. An act thereafter passed exempting life insurance from garnishment held to impair the obligation of the contract.)

*W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56.

(An act authorized the issuance of improvement bonds collectible out of assessments to be levied in a way therein specified. Thereafter the act was changed making the manner of collection of assessments more difficult. Held to impair the obligation of the contract.)

*Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U. S. 453.

(Vicksburg granted a company exclusive right to construct and operate a waterworks and later undertook to construct a competitive system of its own. This court

held the city's action amounted to the impairment of the obligation of the company's contract.)

*Seibert* v. *Lewis,* 122 U. S. 284.

(Act provided for issuance of bonds in aid of railroad construction. Law in effect made adequate provisions for collection of taxes to pay the bonds. After judgment on bonds law changed making the tax laws less effective for bond collection purposes. Held to impair the obligation of the contract.)

Other cases of similar import are,

*Hendrickson* v. *Apperson,* 245 U. S. 105, 112.
*Von Hoffman* v. *City of Quincy,* 71 U. S. 535, 48.
*Asylum* v. *New Orleans,* 105 U. S. 362.

(Asylum had been granted immunity from taxation. It was later sought to impose taxes upon the property. Act held to impair the obligation of the contract.)

*Home of the Friendless* v. *Rouse,* 8 Wall. 430, and
*Dartmouth College* v. *Woodward,* 4 Wheat. 643, cited in support of opinion.

Impair as used in the Federal Constitution defined "to make worse;" "to diminish in quantity, value, excellence or strength;" "to lessen in power;" "to weaken;" "to enfeeble;" "to deteriorate."

*Edwards* v. *Kearzey,* 96 U. S. 595, 99.
*Louisiana* v. *Martin's Parish,* 111 U. S. 716, 20.
*Louisiana* v. *New Orleans,* 102 U. S. 203, 6.
*Walker* v. *Whitehead,* 83 U. S. 314.
*Shreveport* v. *Cole,* 129 U. S. 36.

For a parallel case, this Court's attention is invited to,

*Lovell* v. *St. Louis Mutual Life Insurance Company,* 111 U. S. 624.

To much the same effect is,

*Block* v. *Supreme Council,* 120 Fed. 580.

## II.

**The California authorities did not have jurisdiction either of petitioner's person or his insurance policy, and the proceedings had in California in an attempt to impair and modify said policy, which was without its jurisdiction, are void for want of jurisdiction. It results that said proceedings are not entitled to full faith and credit in Illinois.**

*The proceedings instituted in California were in personam as to petitioner and sought to fix a measure of liability on the part of the insurance company other than that established by his policy of insurance, which policy was in Illinois, of which State he was a citizen and resident.*

*Whether we regard the California proceeding as to petitioner to be in personam or in rem, jurisdiction could not be obtained of either his person or his policy, except by personal service of process in the State of California.*

*We are not now considering what the California Court might or might not do with the assets in its possession or concerning petitioner's rights to participate therein, because there are abundant assets in Illinois to satisfy his policy demand, and the question of what he should be permitted to recover must be determined in Illinois, where he and his policy on the one hand, the $250,000 mortgage belonging to the Old Company on the other hand, and the Old Company, the New Company, and the Conservator are all present within the jurisdiction of the Superior Court of Cook County, Illinois.*

*Postal Telegraph Company* v. *Newport,* 247 U. S. 464, 473.

*Riverside and Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189, 193.

*Pickuet* v. *Swan,* 5 Mass. 35.

*Pennoyer* v. *Neff*, 95 U. S. 714.
*Harding* v. *American Sumatra Tobacco Co.*, 14 Fed. (2d) 168.
*Evans* v. *Charles Scribner's Sons, et al.*, 58 Fed. 303.

*As this Court said in Bank of Jasper* v. *First National Bank, 258 U. S. 112, as neither the certificates of deposit nor the holder thereof were within the State of Florida, its Courts could not—in the absence of consent—acquire jurisdiction to determine the liability of the maker to the holder.*

*A statute of a state being without force in another state, cannot discharge a debtor from a debt held by a citizen of such other state, so the attempted discharge in the California proceeding of the insurance company to the extent of eighty per cent (80%) of the obligation of its policy held by petitioner, is without force in the State of Illinois.*

*Denny* v. *Bennett*, 128 U. S. 489.

## III.

**The insurance policy of petitioner was applied for and delivered to him in the State of Minnesota (Rec. 2) and is, therefore, a Minnesota contract and not a California contract, and accordingly is governed by the law of Minnesota and not the law of California, and inasmuch as the laws of California have no extra-territorial effect they cannot affect contracts made in Minnesota.**

Paragraph 3415, Chapter 19, Mason's Minnesota Statutes, provides that no policy shall be issued or delivered which contains any provision relative to cancellation at the instance of the insurer or limiting the amount of indemnity to a sum less than that stated in the policy.

Rehabilitation was not permissible under the Minnesota statutes, although consolidation or merger was.

Paragraphs 3338 and 3339, Chapter 19, Mason's Minnesota Statutes.

The laws of a State have no extra-territorial effect, and cannot affect contracts made in other States. Hence, an attempt by California to modify the provisions of petitioner's Minnesota contract by reducing the benefits thereof, contrary to the laws which are a part thereof, are null and void.

*Larson* v. *South Dakota,* 278 U. S. 429, 433.
*Louisiana* v. *New Orleans,* 235 U. S. 164, 170.
*Moore-Mansfield* v. *Electric Company,* 234 U. S. 219, 25.
*Mutual Life Insurance Company* v. *Hill,* 193 U. S. at 554.
*Loeb* v. *Columbia Township,* 179 U. S. 472, 93.
*Burgess* v. *Schligman,* 107 U. S. 20, 33.
*Pennoyer* v. *Neff,* 95 U. S. 714.

By reason of the attempt by the California proceedings to modify a Minnesota contract, and to affect the rights of petitioner, a citizen of Illinois, and modify his policy, situated in Illinois, they are lacking in due process of law, in violation of the Fifth Amendment to the Federal Constitution, and Section 1 of the Fourteenth Amendment to said Constitution.

*New York Life Insurance Company* v. *Dodge,* 246 U. S. 357.
*New York Life Insurance Company* v. *Head,* 234 U. S. 149.
*Coverdale* v. *Royal Arcanum,* 193 Ill. 91.
*Ingersoll* v. *Mutual Life Insurance Company of New York,* 156 Ill. App. 568.
32 C. J. 979, and cases cited under note 60.

Said California proceedings also impair the obligations of petitioner's Minnesota contract in violation of Section 10 of Article I of the Federal Constitution.

*Mutual Life Insurance Company* v. *Hill,* 193 U. S. 554.

32 C. J. 976, and cases cited under note 38.

Section 10 of Article I of the Federal Constitution.

The Federal Constitution provides that it shall be the supreme law of the land, and that the judges in every State shall be bound thereby, anything in the Constitution or laws of the State to the contrary notwithstanding.

Section 2 of Article VI of the Federal Constitution.

## IV.

**The full faith and credit provisions of the Federal Constitution do not impose upon a State the obligation to give recognition to the public acts, records and judicial proceedings of another State,**

1. **When the foreign proceedings were had without jurisdiction of the person of a domestic State which is called upon to give full faith and credit to the foreign proceedings, and the same is true where jurisdiction of a res affected is lacking.**
2. **The full faith and credit provisions of the Federal Constitution are not effective unless and until the due process of law provisions of the Fourteenth Amendment to the Federal Constitution have been complied with.**
3. **The full faith and credit provisions of the Federal Constitution are not effective where the foreign proceedings are contrary to the public policy of the domestic State.**

**4. The full faith and credit provisions of the Federal Constitution are not effective where they interfere with the sovereign rights of a sister State.**

*If the judgment of a foreign State was entered without jurisdiction, the full faith and credit provision of the Federal Constitution does not require that it be enforced in a sister State, and such sister State may inquire into the question of jurisdiction.*

*Bradford Electric Light Company* v. *Clapper,* 286 U. S. 145.

*Brown* v. *Fletcher's Estate,* 210 U. S. 82, 90.

*German Saving and Loan Association* v. *Dormitzer,* 192 U. S. 125.

*Owens* v. *McCloskey,* 161 U. S. 642.

*Pennoyer* v. *Neff,* 95 U. S. 714.

*D'Arcy* v. *Ketchum,* 11 How. 165.

*The full faith and credit clause of the Constitution does not require the enforcement of a right that is obnoxious to the public policy of the forum.*

*Bradford Electric Light Company* v. *Clapper,* 286 U. S. 145.

*Union Trust Company* v. *Grossman,* 245 U. S. 412.

*The law of the state where the contract is made governs its construction and determines its validity.*

*Coverdale* v. *Royal Arcanum,* 193 Ill. 91, 106.

*Bradshaw* v. *Newman, Breese,* 133.

*Stacy* v. *Baker,* 1 Scam. 417.

*To entitle a judgment of a sister state to full faith and credit, it must have been rendered with jurisdiction of the person of the defendant and of any res involved.*

*German, etc.* v. *Dormitzer,* 192 U. S. 125.

*Brown* v. *Fletcher's Estate,* 210 U. S. 82, 90.

*Pennoyer* v. *Neff,* 95 U. S. 714, 20.

*Owens* v. *McCloskey,* 161 U. S. 642.

*D'Arcy* v. *Ketchum,* 11 How. 165.

## V.

**The insolvency of an insurance company is a breach of contract. When a Liquidator is appointed, it amounts to a termination of the contract and entitles the policyholder to sue for all damages which he has sustained by reason of the breach.**

*The insolvency of a corporation is equivalent to the repudiation by it of its obligations, and gives to its creditors a right of action against it upon the theory that it has breached its contract.*

*Hobbs* v. *Occidental Life Insurance Company,* 87 Fed. (2d) 380.
*Carr* v. *Carr,* 129 U. S. 252.
*Roehm* v. *Horst,* 178 U. S. 1.

*The dissolution of a corporation or the appointment of a receiver in nowise discharges its obligations.*

*Evans* v. *Illinois Surety Co.,* 298 Ill. 101.

Other cases supporting the above caption are,

*In Re* Western, etc., 50 Fed. (2d) 632-633.
*Gray* v. *Cavalliotis,* 276 Fed. 565, 570.
*Boyd* v. *Wright,* 148 Ga. 216.
*Smith* v. *National,* 65 Minn. 283.
*In Re Emmett,* 214 N. Y. 515.
*People* v. *Security, etc.,* 178 N. Y. 414.

## ARGUMENT.

### I.

**All other questions aside, petitioner is entitled to maintain his suit in the Superior Court of Cook County, Illinois, to prove the amount of his claim and to have that claim established as preferred against the $250,000 mortgage in question and satisfied therefrom accordingly.**

This suit was instituted in the Superior Court of Cook County on the 11th day of August, 1936. At that time petitioner had a right to proceed against the Insurance Company to establish a preferred claim against all assets of said Company in the State of Illinois. The order approving the rehabilitation and reinsurance agreement was not entered until December 4, 1936.

We believe the leading case in Illinois upon this subject to be *Woodward, et al* v. *Brooks, et al.,* 128 Ill. 222, where the Court states the rule as follows:

> "As a voluntary foreign assignment, valid in the State, where made, is enforced in this State as a matter of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor. It is contrary to the policy of our laws to allow the property or funds of a non-resident debtor to be withdrawn from this State before his creditors residing here have been paid, and thus compel them to seek redress in a foreign jurisdiction; so it was held in *Heyer* v. *Alexander,* 108 Ill. 385, that a voluntary assignment of a non-resident debtor's property, valid under the laws of the State where made, will not be enforced here as against domestic attaching creditors. See *Chaffee* v. *Fourth National Bank,* 71 Me. 524; *Kelley* v. *Crap,* 45 N. Y. 46; *Johnson* v. *Parker,* 4 Bush. 149; *Chicago, Milwaukee and St. Paul Railway Co.* v. *Keokuk Northern Line Packet Co.,* 108 Ill. 317; *Life*

*Association of North America* v. *Fassett,* 102 *id.* 315."

As this Court well knows, the reason for the rule above announced is that the Courts of a State will not force citizens of that State to go into a foreign jurisdiction in order to obtain satisfaction of their just claims, but will retain within the State the property of a foreign debtor until the citizens of the State where the property is situated have obtained satisfaction of their just demands.

Other Illinois cases adhering to this doctrine are,

*Woodworth* v. *Beck,* 289 Ill. 579, 581.

*Woodbury* v. *United States Casualty,* 284 Ill. 227, 236.

*Smith* v. *Lamson Bros. & Co.,* 184 Ill. 71.

*Townsend* v. *Coxe,* 151 Ill. 62.

*Juilliard* v. *May,* 130 Ill. 87.

*Sercomb* v. *Catlin,* 128 Ill. 556, 562.

*American Bonding and Casualty Company* v. *Chicago Bonding and Insurance Company, et al.,* 226 Ill. App. 475, 490.

*Judy* v. *Evans,* 109 Ill. App. 154.

This Court in *Pennoyer* v. *Neff,* 95 U. S. 714, 23 and *Clark* v. *Willard,* 294 U. S. 211, approved of and enforced the rule above referred to.

This last case is too fresh in the minds of this Court to require any comment concerning it upon our part.

This Court held in *Pennington* v. *Fourth National Bank,* 243 U. S. 269, 271, that a State within the jurisdiction of which property is situated, exercises jurisdiction over that property by enjoining its removal, and in *Lion Bonding Company* v. *Karatz,* 262 U. S. 277, it was determined that where a Court of competent jurisdiction by appropriate process has taken property into

its possession, that property is withdrawn from the jurisdiction of all other Courts.

Where the question of impairment is involved this Court will make its own construction of contract or statute independently of that of the State Court.

*Panhandle Co.* v. *Highway Commissioners,* 294 U. S. 613-18.

## II.

**The California authorities did not have jurisdiction either of petitioner's person or his insurance policy, and the proceedings had in California in an attempt to impair and modify said policy, which was without its jurisdiction, are void for want of jurisdiction. It results that said proceedings are not entitled to full faith and credit in Illinois.**

The subject matter which the California proceedings seek to operate upon is the Non-Can disability policy of petitioner in the possession of your petitioner who is a citizen of the State of Illinois (Rec. 1), and said policy was applied for and delivered to him in the State of Minnesota (Rec. 2). It is difficult, therefore, to understand how any California Court could claim to have jurisdiction of either petitioner or his policy, and it is, therefore, equally difficult to understand how it may be said in reason that either petitioner or his policy are bound by the California proceedings.

The subject matter secondarily involved in this case is the $250,000 mortgage, which is in the possession of Chicago Title and Trust Company in Chicago, Illinois, and which the Superior Court of Cook County, Illinois, by its injunction took appropriate action to retain within its jurisdiction.

The California proceedings, therefore, were and are *in personam* as distinguished from *in rem,* in so far as pe-

titioner and his insurance policy are concerned and in so far as the $250,000 mortgage is concerned.

It is not contended that the California Courts obtained personal service upon petitioner or that the California Courts had jurisdiction over his person.

If condemnation proceedings were started in the State of California to take or damage the policy of petitioner, situated as it is in the State of Illinois, there could be no doubt but that the California Court would be without jurisdiction. What is the difference then between taking that policy in its entirety and damaging it to the extent of 80 per cent? We submit that there is none, in principle.

This question of jurisdiction was before this Court in *Pennoyer* v. *Neff,* 95 U. S. 714, a case which has been a beacon light followed in cases involving jurisdictional questions since the rendition of its decision.

In that case, at page 720, this Court said:

> "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this Court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy* v. *Ketchum, et al.,* 11 How. 165."

The Court then proceeds to discuss the controlling principles involved in the decision of the case, and at page 721, says:

> "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode

> in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory."

(This case is followed and cited approvingly in *Riverside, etc.* v. *Menefee,* 237 U. S. 189 at 193 and *Postal, etc.* v. *Newport,* 247 U. S. 464 at 473.)

The Court then emphasizes what it had said in general terms by saying, that any direct exertion of authority upon persons and property outside of its jurisdiction is an attempt to give extra-territorial obligation to its laws, or to enforce an extra-territorial jurisdiction by its tribunals, and would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property situated, and be resisted as usurpation.

The Court then makes a pertinent remark in keeping with the decisions of the Illinois Courts to the effect that foreign owned assets in Illinois will be subjected to the claims of Illinois creditors before any portion of them will be permitted to be withdrawn from the State, and in so doing, at page 723, says:

> "So, the State, through its tribunals, may subject property situated within its limits, owned by non-residents, to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claim of its citizens."

What a State in the exercise of its sovereign power cannot do by any means whatsoever certainly one of its citizens may not of his individual volition accomplish by appearing in litigation pending in a foreign State in his own behalf and on behalf of others even if similarly situated, and against their respective wills give to such foreign Court jurisdiction of the persons of such others in matters touching their persons or personal rights not arising out of a *res* situated within the jurisdiction of such foreign Court.

The Court then quotes approvingly from *Pickuet* v. *Swan,* 5 Mass. 35, which quoted language is quite appropriate to the subject matter now under discussion.

The Court then, at page 727, says:

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form upon a non-resident is ineffectual for any purpose. * * * Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

The Court then after reverting to the earlier impressions of the Courts upon the full faith and credit provisions of the Constitution of the United States, gives consideration to the latter conclusions upon the subject, and at page 723, says:

> *"Since the adoption of the Fourteenth Amendment to the Federal Constitution, validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of the parties over whom the Court has no jurisdiction, do not constitute due process of law,"*

And the Court then concludes that where the proceedings in the foreign Court involve the personal rights of a defendant, he must be brought within that Court's jurisdiction by service of process within the State or his voluntary appearance.

In view, therefore, of what this Court has already said upon the subject matter under discussion, and in view of the fact that it is not contended that any personal service was had upon Emanuel E. Larson and that it is not contended that the policy of insurance of petitioner with which the California Court sought to deal, was within the jurisdiction of that Court, and in view of the undisputed fact that the mortgage note here involved was at all times within the State of Illinois, and within the jurisdiction of the Superior Court of Cook County, Illinois, it is respectfully submitted that the California proceedings under discussion are a nullity, at least in so far as they assume to reduce the benefits payable under the Non-Can policy of petitioner.

Two well reasoned Federal decisions in keeping with our contentions are, *Harding* v. *American, etc.,* 14 Fed. (2d) 168 and *Evans* v. *Charles Scribner Sons,* 58 Fed. 303. This last case involved an insurance policy.

*Bank of Jasper* v. *First National Bank,* 258 U. S. 112, presents certain features quite analogous to those here involved, and consequently seems to be quite determinative of the proposition that the California Court had no jurisdiction of the person of Emanuel E. Larson, or his insurance policy.

A statement of the facts involved in the case referred to are quite essential to a clear comprehension of the force of the decision, and inasmuch as those facts take up several pages of the Opinion, we invite the Court's particular attention to the Opinion for the facts, and content ourselves with stating the conclusion arrived at by the Court, which is (page 119):

"As neither the certificates of deposit nor the holder thereof were within the State of Florida, its Courts could not—in the absence of consent * * * acquire jurisdiction to determine the liability of maker to holder."

And so in the case at bar, we submit that as neither the policy of insurance nor the holder thereof, were within the State of California, its Courts could not—in the absence of consent—acquire jurisdiction to determine the liability of the insurer to the insured and in so doing impair the obligation of the insurance contract to the extent of full 80 per cent thereof. We submit that the cases to which we refer conclusively determine that so far as the plaintiff is concerned the California Court was without jurisdiction to adjudicate the Rehabilitatian and Reinsurance contract to be valid, at least in so far as it assumes to decrease the amount of benefits payable to Larson to $100 whereas his policy requires the payment of $500.

We submit therefore that the California Court's order approving the agreement purporting to impair petitioner's policy by reducing the benefits thereunder is without jurisdiction and is void, because in violation of Section 10 of Article I of the Federal Constitution.

In *Denny* v. *Bennett,* 128 U. S. 489, a State passed a law providing for the debtor to make an assignment of his property and upon distribution among creditors filing claims he be discharged from all liabilities. Speaking on this subject, the Court, at page 497, says:

"But it is said that this statute of Minnesota is void under the principles laid down by this Court in the cases of *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Ogden* v. *Saunders,* 12 Wheat. 213; *Baldwin* v. *Hale,* 1 Wall. 223, and *Gilman* v. *Lockwood,* 4 Wall. 409. The proposition lying at the foundation of all these decisions is, that a statute of a state, being without force in any other state, cannot discharge a debtor

from a debt held by a citizen of such other state. One of the best statements of the doctrine is found in the following language used in the latest case on the subject, that of *Gilman* v. *Lockwood, supra.* 'State legislators may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another State in the Courts of the United States, or of any other state, than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner becoming a party to the proceedings. Insolvent laws of one state cannot discharge the contracts of citizens of other states; because such laws have extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction of the cause.' "

In this connection the Court will note of course that petitioner is resorting to Illinois assets over which California has no jurisdiction, to enforce his remedy and those assets are ample to satisfy his demands without resorting to any assets within the jurisdiction of California.

Again according to the petition filed by Commissioner Carpenter, the California proceedings were insolvency proceedings which clearly brings them within the scope of the decision last ~~sighted~~. cited

## III.

**The insurance policy of petitioner was applied for and delivered to him in the State of Minnesota (Rec. 2) and is, therefore, a Minnesota contract and not a California contract, and accordingly is governed by the law of Minnesota and not the law of California and in as much as California laws have no extra territorial effect they cannot affect a contract made in Minnesota.**

The policy of petitioner was applied for and delivered to him in the State of Minnesota, and is therefore a Minnesota contract, and as such, the laws of Minnesota enter into it and become a part and parcel of it.

The law of Minnesota where petitioner's policy was issued and which enters into and controls said policy, provides, that on or after January 1, 1915, no Health and Accident policy shall be issued or delivered until the form thereof and the premium rates have been filed with the Commissioner of Insurance, and further provides, in order to give the Commissioner a chance to pass upon both, that no delivery of a policy shall be made until thirty days after the filing aforesaid.

Paragraph 3415, Chapter 19, Mason's Minnesota Statutes, provides that no policy shall be issued or delivered which contains any provision relative to cancellation at the instance of the insurer or limiting the amount of indemnity to a sum less than that stated in the policy.

It is thus seen that it is the clearly defined public policy of Minnesota to thwart such proceedings as took place in California. In fact, Rehabilitation proceedings are not permissible in Minnesota.

Consolidation or merger with another company are allowed or reinsurance is allowed.

Paragraphs 3338 and 3339, Chapter 19, Mason's Minnesota Statutes.

It is thus to be observed that by its Insurance Act of 1935, California is endeavoring to reach out and beyond the limits of that State and impose its legislation upon Minnesota and impair and modify a Minnesota contract of insurance embodying, in effect, Minnesota laws, and in so doing impair the obligation of petitioner's insurance contract and thereby amend the Minnesota law, which in effect prohibits what the California proceedings in question undertake to do.

This Court has repeatedly declared the law to be as set forth in *Mutual Life Insurance Company* v. *Hill,* 193 U. S., where this Court at page 554, says:

> "Previous decisions in kindred cases have established these propositions: First, the State of Washington was the place of contract. *Equitable Life Assurance Society* v. *Clements,* 140 U. S. 226, 232; *Mutual Life Insurance Company of New York* v. *Cohen,* 179 U. S. 262. Again, the statutory provision of the State of New York in reference to forfeitures has no extra-territorial effect, and does not of itself apply to contracts made by a New York Company outside of that State. Third, parties contracting outside of the State of New York may by agreement incorporate into the contract the laws of that State and make its provisions controlling upon both parties, provided such provisions do not conflict with the law or public policy of the State in which the contract is made. If it were necessary, other cases from this and state courts might be cited in support of these propositions. Applying them, it follows, that, as Washington was the place of the contract, the laws of that State control its terms and obligations, unless the parties thereto have stipulated for some other laws. Such a stipulation, it is insisted, is found in this contract. In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the State of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their ap-

plicability. The case is precisely like one in which the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules."

To the same effect are,

*Larson* v. *South Dakota,* 278 U. S. 429, 433.
*Moore-Mansfield* v. *Electric Company,* 234 U. S. 219, 25.
*Louisiana* v. *New Orleans,* 235 U. S. 164, 170.
*Loeb* v. *Columbia Township,* 179 U. S. 472, 93.
*Burgess* v. *Schligman,* 107 U. S. 20, 33.
*Pennoyer* v. *Neff,* 95 U. S. 714.

*The attempt of California by conservator, liquidator or otherwise to modify that Minnesota contract must fail because California's jurisdiction ends at her border line.*

*The California proceedings are, therefore lacking in due process of law in violation of the Fifth Amendment to the Federal Constitution, and Section 1 of the Fourteenth Amendment to said Constitution.*

*New York Life Insurance Company* v. *Head,* 234 U. S. 149.
*New York Life Insurance Company* v. *Dodge,* 246 U. S. 357.
*Coverdale* v. *Royal Arcanum,* 193 Ill. 91.
*Ingersoll* v. *The Mutual Life Insurance Company of New York,* 156 Ill. App. 568.
32 C. J. 979, and cases cited under Note 60.

*Said California proceedings also impair the obligation of petitioner's Minnesota contract in violation of Section 10 of Article I of the Federal Constitution.*

*Mutual Life Insurance Company* v. *Hill,* 193 U. S. 554.
32 C. J. 976, and cases cited under Note 38.

These California proceedings, at least so far as petitioners policy is concerned, are in violation of Section 10 of Article I of the Federal Constitution and void.

Inasmuch as Article VI of the Federal Constitution provides that said constitution shall be the supreme law of the land, and the judges in every State shall be bound thereby; anything in the constitution or laws of the State to the contrary notwithstanding, the Federal Constitution is part of the public policy of Illinois and the California proceedings being contrary thereto are not entitled to full faith and credit in Illinois.

As Your Honors well know, *Clark* v. *Willard,* 294 U. S. 211, was an insurance case. There is nothing in the Insurance Act of 1929 referred to by the Supreme Court of Illinois in its opinion, that either changes or attempts to change this rule of preference as to insurance matters in the slightest degree.

In *Larson* v. *Pacific Mutual Life Insurance Company,* 373 Ill. 614, in speaking on this subject of the public policy of Illinois with reference to preferred claims being allowed to its citizens out of monies of a non-resident corporation in Illinois, that court at page 623, says:

> "The public policy of this State on this question has been prescribed by legislative enactment. Section 197 of the Insurance Code of 1937 (Ill. Rev. Stat. 1933, Chap. 73, Par. 809) provides provision is made for the Director of Insurance to file a petition against foreign companies under certain specified conditions and procure a rule upon the foreign company to show cause why the Director should not take possession of its assets in this State and conserve the same for the benefit of its creditors * * * and sub-paragraph 4 of said section provides that the rights, powers and duties of such Conservator shall be ancillary to the rights, powers and duties imposed upon the Receiver in charge of property of the Company in the domicilliary State."

The Court then takes note that petitioner's suit was filed in October, 1936. The fact is that it was filed August 11, 1936.

The Court then refers to Section 6 as amended in 1929, entitled, An Act in relation to delinquent insurance companies (Smith-Hurd Stat. 1931, Chap. 73, Par. 500) which was in force when petitioner's suit was filed in the Superior Court of Cook County, Illinois.

The Opinion of the Court then continues at page 624, as follows:

> "It provides that whenever a non-resident insurance company authorized and having assets in this State has been placed in the hands of a Receiver of the domicilliary State, that the Director shall report the case to the Attorney General of this State, and he should make application to the Circuit Court of the County in which the office of such non-resident company was located for a rule upon such non-resident company to show cause why a receiver should not be appointed in Illinois to take possession and conserve the assets in Illinois for the benefit of its creditors."

There is nothing in this 1929 act that militates against the well established rule in Illinois heretofore referred to, with reference to Illinois creditors having preferred claims against funds in the hands of such Illinois Receiver, if there were one, but the fact is that no action was taken by any of the State Officials of the State of Illinois, with reference to a Receiver of The Pacific Mutual Life Insurance Company of California in Illinois.

We submit that had there been such Receiver, it would have been the duty of the Court appointing that receiver to have allowed to petitioner herein a preferred claim.

It may or may not be that *if* that Code were retroactive, it would change the rule of preference, but the fact is that it does not even pretend to be retroactive, and even if it were expressly made retroactive, inasmuch as petitioner had a matured claim for preference, this act

passed in 1937 about one year after petitioner had instituted his action to enforce his preferred claim, the retroactive feature of said 1937 Insurance Act would be unconstitutional, as we shall subsequently endeavor to demonstrate.

**Section 1. XIV Amendment to Federal Constitution.**

It seems, however, that an individual who has a claim against an insurance company may proceed to collect that claim, and that the insurance statutes, such as the statutes of 1929 and 1937, are not an impediment to the prosecution of such individual action. It would seem monstrous if the rule were to the contrary, because in this case neither the Insurance Department of Illinois nor the Attorney General took any action to protect creditors. If a creditor under such circumstances were helpless to protect himself, it is quite likely that many constitutional limitations would apply to such acts, depriving him of his remedy, which is a vested right that may not be impaired.

However, the Courts of Illinois have held that such insurance claimant is not so deprived.

In *Bastian* v. *Modern Woodmen,* 166 Ill. 595, it was contended that the suit there sought to be prosecuted by the members of the Insurance Organization was not within their province, but that such action could only be prosecuted by the Attorney General, but the Supreme Court of Illinois held that the individuals were entitled to prosecute their own suits.

In quite a recent case—*Dale* v. *Hancock,* 363 Ill. 222, the members of an Insurance Association instituted action to restrain the method in which its officers were seeking to conduct the business of the Insurance Association, and the Supreme Court of Illinois held that they had a right to maintain such suit, notwithstanding a

provision of the act under which the Association was incorporated, providing no decree restraining or interfering with the business of an Insurance Company can be had except on application of the Director of Trade and Commerce.

This same case was heard in the Appellate Court in *Dale* v. *Hancock,* 282 Ill. App. 70. The Court there distinguished between these private suits and actions such as were involved in *People* v. *Niehaus,* 356 Ill. 104, where, at the suit of individuals, it was sought to have a Receiver appointed to take charge of the Company and its affairs and wherein it was held that such bill would not lie.

So far as an endeavor on the part of the petitioner to seek satisfaction of his claim out of the $250,000 mortgage is concerned, his suit is not substantially different from an attachment suit to reach the same mortgage in satisfaction of petitioner's claim.

It is not contended that the Insurance Company was in anywise hampered in the conduct of its insurance business or that there is any danger of the mortgage or the proceeds thereof being diverted to any purpose other than a legitimate one, and we submit that this suit certainly is a legitimate one, unless California and its officers can enact laws that reach out and beyond California and affect citizens of Illinois in the protection of their rights and the prosecution of their just claims.

Coming now to the retroactive effect of the 1937 Act as construed by the courts of Illinois, such effect would render the Act void in that particular as an impairment of the obligation of petitioner's contract.

In *Treigle* v. *Acme, etc.,* 297 U. S. 189, Your Honors had before you the case where a member of a Building and Loan Association had, pursuant to its by-laws, made application for withdrawal, as had many other members

of the Association. At the time of such application, the law required a percentage of the receipts to be set aside to pay withdrawing members. After the member's application for withdrawal and before the amount due him was paid, an Act was passed abolishing the requirement concerning the setting apart of a percentage of the receipts to pay withdrawals.

This Court held that the Act impaired the obligation of a stockholder's contract and destroyed his vested rights in violation of Section 10 of Article 1 and of Section 1 of the Fourteenth Amendment of the Federal Constitution.

In the case here pending, we have a parallelism in principle. Prior to 1937, petitioner had a vested right to establish a preferred claim against the Insurance Company's assets in Illinois, and took appropriate action so to do. In so far as the 1937 Act can be said to destroy his vested right to a preferred claim, and his right to prosecute the suit which he had instituted for that purpose, before the passage of the 1937 law, that law meets the barrier of Section 10 of Article 1 and Section 1 of the Fourteenth Amendment to the Federal Constitution, and we submit should be held void in that particular.

It is to be noted in this particular that the obligation of a contract carries with it the remedy given for its enforcement, and that to destroy the remedy is to impair the obligation of the contract.

In *Walker* v. *Whitehead,* 83 U. S. 314, plaintiff was sued upon a promissory note in the State of Georgia. Some six years after the note was made, an Act was passed barring an action on such notes unless the taxes had been paid on such notes. In passing upon this change in remedy, the Court, at page 317, says:

"The contract here in question is within the predi-

cate of this act. It was made more than six years before the act was passed. The act was retrospective * * * denounced a penalty not before prescribed for the nonpayment of taxes * * * and, if such delinquency had existed for a single year, confiscated the debt by making any remedy to enforce payment impossible. The denunciation and the penalty came together. There was no warning and there could be no escape. The purpose of the Act was plainly not to collect back taxes * * * that was neither asked nor permitted as a means of purgation * * * but to bar the debt and discharge the debtor. * * *

The Constitution of the United States declares that no state shall pass any 'law impairing the obligation of contracts.'

These propositions may be considered consequent axioms in our jurisprudence.

The laws which exist at the time and place of the making of a contract, and where it is to be performed, entered into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement;

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the Obligation which is guaranteed by the Constitution against impairment;

The obligation of a contract 'is the law which binds the parties to perform their agreements;

Any impairment of the obligation of a contract * * * the degree of impairment is immaterial—is within the prohibition of the Constitution;

The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming

from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives their protection to that extent. *Von Hoffman* v. *The City of Quincy,* 4 Wallace, 535. The effect of these propositions upon the judgment before us requires but a single remark. A clearer case of a law impairing the obligation of a contract, within the meaning of the Constitution, can hardly occur."

In *Osborn* v. *Nicholson,* 80 U. S. 654, a man had sold a negro slave to another and warranted that he had a good title to the slave and that said negro to be a slave for life.

This Court held, notwithstanding the adoption of the 13th Amendment to the Federal Constitution, prohibiting slavery, an action could be maintained on the warranty.

In *W. B. Worthen Co., et al.* v. *Thomas,* 292 U. S. 426, the plaintiff had procured a judgment and garnisheed a fund due under a life insurance policy. The State thereafter passed a statute exempting all life insurance from garnishment. This Court held the exemption act an impairment of the obligation of the plaintiff's contract and void.

In *W. B. Worthen Co., Trustees* v. *Kavanaugh, Trustees,* 295 U. S. 56, municipal improvement bonds were issued collectible out of assessments to be made in a certain way. Thereafter, the State of Arkansas changed the law with reference to collection of assessments in a manner to make the collection of the bonds more difficult.

This Court held that the new law amounted to the impairment of the obligation of the contract in violation of a Federal Constitution.

In *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U. S. 453, Vicksburg had granted to the Company the exclusive right to construct and operate a waterworks system, and later on took action to construct a competitive system of its own. The State Court held that the City's action amounted to an impairment of the obligation of the Company's contract. This Court sustained the State Court.

In *Seibert* v. *Lewis,* 122 U. S. 284, at the time bonds were issued by a municipality in aid of railroad construction, a law was in effect making adequate provision for the collection of taxes to pay the bonds. A bondholder obtained a judgment while that law was in effect. Thereafter the law was changed making the tax laws much less effective for bond payment purposes.

This Court held such later law impaired the obligation of the contract contained in the bond, and in so doing, at page 295, said in part:

> "In *Louisiana* v. *New Orleans,* 102 U. S. 203, 206, Mr. Justice Field, in the opinion of the Court, said: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced * * * by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.' "

There are a number of other cases involving public bonds of different types, but where the principle involved in this Court's decision is substantially the same as in the case last above cited.

Some of these cases are,

*Hendrickson* v. *Apperson,* 245 U. S. 105, 112.

*Von Hoffman* v. *The City of Quincy,* 71 U. S. 535, 548, wherein a number of earlier decisions on the subject are cited.

In *Asylum* v. *New Orleans,* 105 U. S. 362, the Asylum had been granted exemption from taxation, but it was later sought to impose taxes upon its property thereby impairing the contract. At page 368, this Court said:

> "We cannot concur in this view. We think that the power of abrogation, or alteration, was qualified by the duty of providing indemnity to the full extent of the damage or burden caused by such change. This conclusion seems to us so obvious as to require no extended argument in its support."

The Court founded its opinion in part on *Home of the Friendless* v. *Rouse,* 8 Wall. 430, and *Dartmouth College* v. *Woodward,* 4 Wheat. 643.

The Court then at page 369 continues:

> "We are of opinion that the imposition of the tax in question, contrary to the express terms of the Charter, and without any provision for compensation or indemnity, was not a legitimate exercise of the power of dissolution reserved in the Code; and that sec. 118 of the Constitution of 1868, and the legislative act by virtue of which the said tax was imposed, as construed and applied to the circumstances of this case, are in violation of the 10th section of Article 1 of the Constitution of the United States."

We submit that there is not the slightest difference in principle between the case last above referred to and the case herein presented to Your Honors.

The effect of the 1937 Insurance Code as construed by the Supreme Court of Illinois is diametrically opposed to the above mentioned opinion of this Court.

Reading the Rehabilitation and Reinsurance Agreement as if it were effective, then before it came into existence, in case of disability, petitioner could have sued on his policy and recovered $500 per month; if he comes under the Agreement and now sustains a disability he may not sue upon the policy and recover

$500 per month, he can recover only $100. He cannot sue for the $400. He may never be able to sue for it. Clearly the obligation of his contract has been impaired.

In *Edwards* v. *Kearzey,* 96 U. S. 595, at page 599, it is said:

> "The Constitution of the United States declares that 'no State shall pass any * * * law impairing the obligation of contracts.'
>
> A contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done.
>
> The lexical definition of 'impair' is 'to make worse; to diminish in quantity, value, excellence or strength; to lessen in power; to weaken; to enfeeble; to deteriorate.' Webster's Dict. * * *
>
> The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' 1 Bac. Abr., tit. Actions in General, letter B."

This Court then proceeds to cite and comment on,

*Von Hoffman* v. *City of Quincy,* 4 Wall. 535.

*Green* v. *Biddle,* 8 Wheat. 1.

Other cases bearing upon this subject are,

*Louisiana, ex rel., Nelson* v. *Martin's Parish,* 111 U. S. 716, 720.

*Louisiana, ex rel., Ranger* v. *New Orleans,* 102 U. S. 203, 206.

*Walker* v. *Whitehead,* 16 Wall. 314.

*Shreveport* v. *Cole,* 129 U. S. 36.

*Lovell* v. *St. Louis Mutual Life Insurance Company*, 111 U. S. 264, is not unlike the case here presented in many particulars. There, as here, a company in which a man was insured undertook to pass its business on to another company. There, as here, the insured declined to pay premiums to the New Company and sued the Old Company for his damages and sought to collect those damages out of the fund on deposit with the Insurance Department of Tennessee.

The Court there held that the insured was under no obligation to keep up his payments in the New Company, and as this Court there said, "in which, perhaps, he reposed no confidence whatever," and as this Court further said (Rec. 273):

> "Still the complainant might be without other remedy than that of accepting insurance in the new company, or of prosecuting the old and virtually defunct company, if it were not for the fund deposited with the treasurer of Tennessee as indemnity to the citizens of that State holding policies in the company. The assignment of all its assets by the old company to the new upon the consideration of its obligations being assumed by the new company, is somewhat analogous to an assignment of property by a debtor for the benefit of his creditors, in which only those creditors who are preferred, or those who choose to come in and participate in the fund assigned, receive any benefit, whilst those who refuse to come in take no benefit, preferring to retain their claim against the debtor. So here, if the complainant does not choose to continue his insurance with the new company, he would have no remedy except against the old company (which is totally unable to respond) were it not for the fund which has been attached in the hands of the State treasurer of Tennessee. To this fund, the complainant, being a citizen of Tennessee, had a right to resort."

To much the same effect is *Block* v. *Supreme Council*, 120 Fed. 580.

The decision of the trial court clearly impairs petitioner's vested rights, not only to a preferred claim but to any cause of action whatsoever. It denies to an Illinois citizen all right to be heard against the Old Company, the New Company or the Liquidator, in the State of Illinois, and that too notwithstanding the fact that all three of them appeared in this case in the trial court and submitted themselves to its jurisdiction.

The Illinois Courts have construed the 1937 Insurance Act, passed about a year after the institution of this case in the trial court, to enforce whatever legal rights petitioner had by virtue of his policy, as having a retroactive effect and depriving petitioner of a vested right to a preferred claim against an insurance company's $250,000 mortgage, which was within the jurisdiction of the trial court. The decisions of this Court hereinbefore referred to, we submit, abundantly sustain our contention that the Illinois Courts committed reversible error, and that their action in the matter was in violation of Section 10 of Article 1 of the Federal Constitution, prohibiting the impairment of the obligation of contracts, which this Court has repeatedly held to include the impairment of any vested right.

In determining this question under your repeated decisions, you will, of course, decide the question of the impairment for yourself without being controlled by what the State Courts of Illinois may have said upon the subject.

In *Terre Haute* v. *Railroad Company,* 194 U. S. 579, the State Court of Indiana had placed its construction upon a statute. When the United States Supreme Court was called upon to determine whether such legislation impaired the obligation of a contract, speaking on this subject, Your Honors, at page 587, said:

"We are driven to a different construction of the charter, notwithstanding the deference naturally

felt for the decision of a state court upon state laws. The language is plain. * * *

The case then stands thus: The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrant unconstitutional laws, because the state court put forth the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 697."

In *Louisiana Railway and Navigation Co.* v. *New Orleans,* 235 U. S. 164, this Court, at page 170, says:

"It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee. *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436, 442, 443; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116, 144, 145; *University* v. *People,* 99 U. S. 309, 321; *Mobile & Ohio Railroad* v. *Tennessee,* 153 U. S. 486, 492; *Douglas* v. *Kentucky,* 168 U. S. 488, 502; *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 556; *Russell* v. *Sebastian,* 233 U. S. 195, 202. And, in determining

whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court. *McCullough* v. *Virginia,* 172 U. S. 102, 116; *Houston & Texas Central Railroad Co.* v. *Texas,* 177 U. S. 66, 76, 77; *Hubert* v. *New Orleans,* 215 U. S. 170, 175; *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, 376. In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the City asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out."

To much the same effect is,

*Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U. S. 453.

*Mutual Life Insurance Company* v. *Hill,* 193 U. S. 554.

*Larson* v. *South Dakota,* 278 U. S. 429, 433, where a number of your prior decisions are cited.

However, it will make no difference if the Illinois Courts should predicate their action on the 1929 statute referred to in the Opinion of the Supreme Court because that statute became effective about nine years after petitioner's contract went into effect on the 5th day of August, 1921, as appears from the original record in this court.

So far as our investigation has enlightened us, no provision existed for the appointment of a Receiver prior to 1929. There was a provision in the 1925 statute

providing for the application by the Director of Insurance through the Attorney General for an order of Court authorizing said Director to take possession of the assets of a foreign company in Illinois "and conserve its assets in Illinois for the benefit of its creditors and for such other relief as the nature of the case and the interest of its policyholders, creditors, members, stockholders or of the public may require." (Par. 500, Chap. 73, Page 1560, Smith-Hurd's Illinois Revised Statutes.)

Surely there is nothing in that statute that indicates the slightest disposition on the part of the Legislature of Illinois to preclude a preferred claim against the assets in Illinois of a foreign insurance company. It results that petitioner had a vested right to a preferred claim, which right continued to the present time, regardless of anything in the 1929 Act or in the 1937 Act contained.

We therefore submit that the proceedings in Illinois impair the obligation of petitioner's contract and impair his vested rights in violation of Section 10 of Article 1 of the Federal Constitution and deny to him the equal protection of the law in violation of Section 1 of the XIV Amendment to said Constitution.

## IV.

**The full faith and credit provisions of the Federal Constitution do not impose upon a State the obligation to give recognition to the public acts, records and judicial proceedings of another State,**

1. **When the foreign proceedings were had without jurisdiction of the person of a domestic State which is called upon to give full faith and credit to the foreign proceedings, and the same is true where jurisdiction of a res affected is lacking.**

2. **The full faith and credit provisions of the Federal Constitution are not effective unless and until the**

**due process of law provisions of the Fourteenth Amendment to the Federal Constitution have been complied with.**

3. **The full faith and credit provisions of the Federal Constitution are not effective where the foreign proceedings are contrary to the public policy of the domestic State.**

4. **The full faith and credit provisions of the Federal Constitution are not effective where they interfere with the sovereign rights of a sister State.**

1. We have discussed the first of the four points above stated under Point II mentioned in this argument under the title,

> "The California authorities did not have jurisdiction either of petitioner's person or his insurance policy, and the proceedings had in California in an attempt to impair and modify said policy which was without its jurisdiction, are void for want of jurisdiction. It results that said proceedings are not entitled to full faith and credit in Illinois."

We have further discussed the question of jurisdiction under Point III of the argument,

> "The insurance policy of petitioner was applied for and delivered to him in the State of Minnesota, and is, therefore, a Minnesota contract, and not a California contract, and accordingly is governed by the law of Minnesota and not the law of California, and inasmuch as the laws of California have no extra-territorial effect, they cannot effect contracts made in Minnesota."

We respectfully submit that the California proceedings are void for want of jurisdiction, both of petitioner's person and his insurance policy.

2. *The full faith and credit provisions of the Federal Constitution are not effective unless and until the due process of law provisions of the Fourteenth Amendment to the Federal Constitution have been complied with.*

Due process, as this Court has often announced, requires legal notice to the defendant served upon him in the State assuming to exercise jurisdiction where a judgment *in personam* is sought, and requires the presence within the State assuming to exercise jurisdiction of the *res* when the proceeding is in *rem*. Neither of these requirements have been met as is shown by the argument under Point II of this Argument.

> *German, etc.* v. *Dormitzer,* 192 U. S. 125.
> *Brown* v. *Fletcher's Estate,* 210 U. S, 82, 90.
> *Pennoyer* v. *Neff,* 95 U. S. 714, 20.
> *Owens* v. *McCloskey,* 161 U. S. 642.
> *D'Arcy* v. *Ketchum,* 11 How. 165.

3. Section 2 of Article 2 of the Illinois Constitution provides, no person shall be deprived of life, liberty or property without due process of law.

Section 13 of Article 2 of the Illinois Constitution provides, in part, private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the State shall be ascertained by a jury and shall be prescribed by law.

Section 14 of Article 2 of the Illinois Constitution provides, no *ex post facto law* or law impairing the obligation of contracts or making any irrevocable grant of special privileges or immunities shall be passed.

The applicable provisions of the Fifth Amendment to the Federal Constitution are, that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

The applicable provisions of Section 1 of the Fourteenth Amendment to the Federal Constitution are, no State shall deprive any person of life, liberty or property without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.

The applicable provisions of Section 10 of Article 1 of the Federal Constitution are, no State shall pass any *ex post facto* law or law impairing the obligation of contracts.

Section 1043 of Chapter 145 of the California Insurance Code provides in substance: In any proceeding under this Article, the Commissioner as Conservator or Liquidator may, subject to the approval of said Court, and subject to such liens as may be necessary, mutualize or reinsure the business of said person, or enter into Rehabilitation Agreements. Said Rehabilitation or Reinsurance Agreements shall provide that subsequent to the date and for such period of time as the Commissioner may determine, no investment or reinvestments of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the Commissioner.

The provision in the Rehabilitation and Reinsurance Agreement complained of is that which reduces the benefits under petitioner's policy to twenty per cent (20%) of the amount provided for in his policy, or in dollars and cents from $500 to $100 per month (Rec. 132).

There are only two possible views to take of Section 1043.

(*a*) It does confer upon the Commissioner of Insurance authority to enter into a Rehabilitation and Reinsurance Agreement impairing the obligation of petitioner's policy contract,

(*b*) or, on the other hand, it does not confer any such authority upon the Commissioner.

If the first view is to be adopted, the section impairs the obligation of petitioner's contract of insurance. It

does take or damage petitioner's policy, which is his private property, either for public use or private use. If for public use, it violates the constitutional provisions above referred to embodied in both the Federal and Illinois Constitutions. If on the other hand the taking is for the private use of other classes of policyholders, there is no authority for the taking or damaging, and the proceedings are without due process of law.

The Supreme Court of California, mindful of this situation, in its opinion stated:

> "The Old Company was powerless to change the existing Non-Can Policies. The contract and due process clauses prohibited the Company from making any changes therein. But these prohibitions do not apply to the State acting under its police power."

Here is a statement from the highest Court of California that the whole proceedings here involved are void, unless in acting with reference to them, the State was justified in so acting by virtue of the exercise of its police power.

Had the Supreme Court of California taken occasion to read Section 10 of Article I of the Federal Constitution, it is not improbable that the language last above quoted would not have been written, because that section applies to *States* and not to *persons*. The pertinent words of that constitutional provision are,

> "No State shall * * * pass any * * * law impairing the obligation of contracts;"

As we point out elsewhere, the confiscation of a large part of the benefits provided to be paid under the terms of what is conceded to be a valid contract of disability insurance, all for the primary benefit, not of the public of California in general, but for the private benefit of a class of life policyholders, only forty per cent of whom

are residents of California (Rec. 185), and for whose benefit alone California could legislate, does not constitute an exercise of the police power as this Court has held in cases which we cite herein. It is *taking,* which is an act of eminent domain, as distinguished from *regulating,* which is an exercise of the police power. Sixty per cent of the Old Company's business was conducted in forty states other than California (Rec. 186).

Secondarily and on final analysis it is the Old Company stockholders who are to benefit by this taking.

This Court in cases almost innumerable held that the police power of the State is subject to the limitations of the Federal Constitution. Among the cases so holding are the following:

In *Panhandle Co.* v. *Highway Commission,* 294 U. S. 613, a highway commission ordered the relocation of a pipe line company's lines on its own right of way by reason of certain improvements being made in the highway. The State Court held the action of the Commission valid. This Court, at page 618, says:

> "If carried into effect, the challenged order of the Commission would result in taking private property for public use. *Oregon R. & M. Co.* v. *Fairchild,* 224 U. S. 510, 523, 524; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 194. A prive right of way is an easement and is land. *United States* v. *Welch,* 217 U. S. 333, 339. No compensation was provided for; none was intended to be made. Ordinarily, at least such taking is inhibited by the Fourteenth Amendment. *Chicago, B. & Q. Ry. Co.* v. *Chicago,* 166 U. S. 226, 241; *Chicago, B. & Q. Ry.* v. *Drainage Comm'rs,* 200 U. S. 561, 593; *McCoy* v. *Union Elevated R. Co.,* 247 U. S. 354, 363; *Chicago, B. & Q. Ry. Co.* v. *Public Utilities Comm'n,* 69 Colo. 275, 279, 193 Pac. 726. See Lewis, Eminent Domain (3d ed.) sec. 223.
>
> *A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. Schlesinger* v. *Wisconsin,*

270 U. S. 230, 240; *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 508; *Southern Ry. Co.* v. *Virginia, supra,* 196. * * *"

In *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, the Court, at page 196, says:

> "The claim that the questioned statute was enacted under the police power of the state and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that every state's power is limited by the inhibitions of the XIV. Amendment. *Chicago, M. St. P. and P. Ry.* v. *Tompkins,* 176 U. S. 167; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Adams* v. *Tanner,* 244 U. S. 590, 594; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 549, 550. * * *"

In *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 this Court at page 415 uses pertinent language as follows:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until it may be private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. * * *
>
> In general, it is not plain that a man's misfortunes or necessities will justify his shifting the damage to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.,* 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the ends by a shorter cut than the constitutional way of paying for the change."

(This shifting is just what is attempted to be done in this case.)

The cases from which we have just quoted determine, from the viewpoint of the Federal Constitution, that the so-called Rehabilitation and Reinsurance Contract violates the Federal Constitution. It is a necessary sequence that the approval of the California Court could not breathe validity into that which is unconstitutional and void.

Other decisions of this Court in point are,

*Eubank* v. *Richmond,* 226 U. S. 137, 140.
*Burns* v. *Bryan,* 264 U. S. 504.
*Allgeyer* v. *Louisiana,* 165 U. S. 578, 90.
*New York, etc.* v. *Head,* 234 U. S. 149-57.
*Liggett Company* v. *Baldridge,* 278 U. S. 105.
*Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin,* 238 U. S. 491.

Had the Supreme Court of California read the cases from which we have just quoted and those above cited, it is quite possible it would not have written into its opinion the language which we have quoted therefrom.

The California Court was undoubtedly hard pressed for a reason to give for sustaining the validity of the Rehabilitation and Reinsurance Contract and gave the very best one that it could conceive of—the stock reason, in case of desperation—the greatly abused police power. Certainly it could give no better reason.

Certainly the reason given does not exist.

Certainly said contract is unconstitutional and void.

If there is any statute in California authorizing said contract, said statute is likewise void.

However, we have been unable to find any such statute.

It seems that Section 1043 of the Insurance Code is the sole basis claimed for the California proceedings in question (Rec. 112).

The above quoted language of the California Court is a tacit admission that if the state's police power is subject to the Federal Constitution, the Rehabilitation and Reinsurance proceedings are without foundation in law and void.

We have seen that the State's police power is subject to the Federal Constitution. It results that on the basis of the California decision, said proceedings are in violation of the Federal Constitution and void.

It results also that said California proceedings are likewise for other reasons contrary to the public policy of Illinois as evidenced by the several provisions of the Illinois Constitution.

If petitioner's policy contract is taken in large part —even if for public use—that taking being without compensation violates both the Fifth Amendment to the Federal Constitution and Section 13 of Article II of the Illinois Constitution. Such taking also amounts to a deprivation of property without due process of law in violation of the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Federal Constitution and Section 2 of Article II of the Illinois Constitution. It also amounts to impairing the obligation of petitioner's policy contract contrary to Section 10 of Article I of the Federal Constitution and Section 14 of Article II of the Illinois Constitution.

It is thus to be seen that, contrary to the Supreme Court of California, this Court holds that the police power of the State is subject to the Federal Constitution.

Necessarily the applicable provisions of the Federal Constitution are a part of the public policy of the State of Illinois notwithstanding the fact that the Supreme Court of California holds that the State is not bound by the Federal Constitution. Article VI., Federal Constitution.

The interesting feature about the applicability of the Federal Constitution to the State of California and its police power is that by Section 3 of Article I of the California Constitution, it is provided that the State of California is an inseparable part of the American Union, and that the Constitution of the United States is the supreme law of the land.

However, the Federal Constitution provides in part,

> "The Constitution and laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges of every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding."

For some reason not appearing of record, Your Honors were not given an opportunity to pass upon the question of the police power being subject to the pertinent provisions of the Federal Constitution, when the California case was before you.

Aside from the Federal Constitution and the decision of this Court relative thereto being a part of the public policy of Illinois the public policy of Illinois is that private property may not be taken or damaged in the exercise of the police power.

As the Supreme Court of Illinois tersely states it, in speaking of the police power, in *Sanitary District* v. *Chicago and Alton Railroad Company,* 267 Ill. 252:

> "Notwithstanding, however, it is very broad and far reaching, it is not without its restrictions. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be for the time to the public health, safety, etc."

Other Illinois cases of similar import are,

> *The Village of Bradley* v. *The New York Central Railroad Company,* 296 Ill. 383.

*The East Side Levee and Sanitary District* v. *The East St. Louis and Carondelet Railway*, 279 Ill. 123.
*The East Side Levee and Sanitary District* v. *The Mobile and Ohio Railroad Company*, 279 Ill. 319.
*The East Side Levee and Sanitary District* v. *The East St. Louis, Columbia and Waterloo Railway Company*, 279 Ill, 362.
*The City of Chicago* v. *Jackson*, 196 Ill. 496-504.

The Court will, of course, note that there is no attempt in the proceedings here involved to regulate the business of an insurance company. None of its property is taken or damaged. None of its contracts are impaired. Necessarily, if the State is bound by the Federal Constitution, all of its co-ordinate branches, legislative, executive, and judicial, are likewise bound. Certainly, no one will seriously contend that the Insurance Superintendent, an Agent of the State, may do that which the Federal Constitution prohibits the State itself from doing.

It is axiomatic that no gratuitous pronouncement by the Supreme Court of California that California's police power is not limited by the Federal Constitution, can work an exemption from the provisions of that Constitution, which, by their express terms, are made applicable to the State.

The California proceedings being contrary to the law of Illinois as declared by its Supreme Court are in turn contrary to Illinois public policy and are not entitled to full faith and credit in Illinois.

In the cases cited, it is noted that the police power is a power to regulate property, when the general health, convenience, etc., would otherwise be injured, were it

not for the regulation. It may be that both the life policyholders and the Non-Can policyholders were unfortunate in procuring policies in a company managed by those without the ability to conduct the affairs which they assumed to manage, and without a sufficiently high order of supervision of the Department of Insurance of the State of California, but such a situation constitutes no justification for one class of policyholders in The Pacific Mutual Life Insurance Company of California shifting the burden of their misfortune on the shoulders of another class of policies in such Company, so that the one class bears none of the burden and the other bears it all, so that one class receives 100 per cent of that called for by their insurance contracts, and those of another class would be required to receive as little as only 20 per cent thereof.

> *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, quoted from *supra.*

We have referred under Point I to the decisions of this Court upon what constitutes impairment and will not repeat those citations here.

Section 10 of Article 1 of the Federal Constitution, provides in part:

> "No State shall pass any bill or attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

Section 1 of the Fourteenth Amendment to the Federal Constitution, provides in part:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Federal Constitution provides in part:

> "That no person shall be deprived of life, liberty or property without due process of law; nor shall

private property be taken for public use without just compensation."

We respectfully submit that the California proceedings constitute a flagrant violation of each and all of the Federal constitutional provisions just above referred to.

It may well be, The Pacific Mutual Life Insurance Company of California so conducted its business that its total assets were not sufficient to constitute sufficient reserves in support of all of its outstanding policies in accordance with the proper conduct of the business of an Insurance Company, but that is no reason why one class of policyholders should be selected to make up the existing deficiency, and other classes have the benefits of their policies continued at the full face value thereof (Rec. 132).

A microscopic examination of the policy of petitioner (Rec. 8-18) will fail to disclose to Your Honors the slightest particular in which your petitioner's rights thereunder are in anywise subordinated to the rights of the holders of other policies of the same or any other class.

The 13th section of Article 2 of the Illinois Constitution has substantially the same provision as Fifth Amendment to the Federal Constitution with reference to taking private property for public use without just compensation.

Section 2 of Article 2 of the Illinois Constitution contains a provision substantially the same as that contained in Section 1 of the Fourteenth Amendment to the Federal Constitution with reference to any person being deprived of life, liberty or property without due process of law.

Section 14 of Article 2 of the Illinois Constitution contains a provision substantially the same as that embodied in Section 10 of Article 1 of the Federal Constitu-

tion with reference to impairing the obligation of contracts.

We believe that we have indicated by what has been heretofore said herein that all of these constitutional provisions were violated by the California proceedings involving the Rehabilitation and Reinsurance Agreement; that in consequence thereof said California proceedings are doubly contrary to the public policy of Illinois, and as a result thereof not entitled to full faith and credit in Illinois.

Another reason why the proceedings in question are not entitled to full faith and credit in Illinois, is that the appeals taken to the State Court and this Court were not fully and fairly presented. As this Court had occasion to note none of the evidence was in the record, and many of the Federal constitutional questions were not so raised as to call for a ruling thereon by this Court.

It is contrary to the public policy of Illinois that its citizens should be bound by representation under such circumstances. As was said in *Longworth* v. *Duff*, 297 Ill. 479, a party who is not before the Court may be held to be represented by others only when his interests receive *actual and efficient* protection.

The provision for funds with which to restore benefits is found in Paragraph 14 of the Contract, which provides (Rec. 133):

> "The Board of Directors of the New Company shall from time to time transfer from the funds of the New Company available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can policies, *in such manner as the Board of Directors, with the approval of the Commissioner, may from time to time determine, such amounts as said Board of Directors in its discretion shall determine to be not reasonably required for the reasonable, proper and profitable*

*conduct of the operations of the New Company as a going concern.*" (Italics ours.)

In the policy of petitioner, we have an unqualified obligation which can be enforced in a court of law whereby petitioner may, when disabled, enforce the payment of $500 per month to him.

The Rehabilitation and Reinsurance Agreement takes this right away from him and gives him in lieu of it a right to recover $100 per month only, coupled with a most nebulous and uncertain chance of obtaining the remaining $400 at some time and in some way. Then we have the expressed provision that the New Company shall be under no obligation to restore the $400 of benefits taken from petitioner by the Rehabilitation and Reinsurance Agreement in question to which he is not a party, except upon the contingencies expressed in said Agreement, should they ever arise.

An examination of the Rehabilitation and Reinsurance Agreement shows that there is no possibility of restoration of the $400 in the near future. It is impossible to tell from said Agreement when, if ever, restoration will take place.

In this connection, we respectfully invite the Court's attention to the analysis of this Rehabilitation and Reinsurance Agreement appearing in the Appendix to the petition herein, and ask you to determine for yourself how uncertain and indefinite it is, and note how the New Company is expressly freed from any definite obligation to restore.

We confidently believe that you will find it so uncertain and indefinite as to bring it clearly within the rule that you have laid down, and pursuant to which you have felt impelled to brand statutes void for uncertainty.

In *International Harvester Company* v. *Kentucky,* 234 U. S. 216, you held that to compel men to guess what

the fair market value of commodities manufactured or sold by them would be under other than existing conditions is beyond constitutional limits.

The finding of the trial court is (Rec. 115):

> "4. That adequate provision is made by the said Rehabilitation and Reinsurance Agreement, Exhibit 'A', for each and every class of policyholders, creditors, and stockholders of respondent corporation and all other persons interested in respondent corporation, its properties, assets, or estate; that neither said Agreement nor the plan therein embodied discriminates unfairly or illegally in favor of any class of policyholders, creditors, stockholders, or other persons interested in respondent corporation, its properties, assets, or estate; that said Agreement and the plan therein embodied do, and each of them does, fairly and equitably protect and adjust the rights, obligations, and liabilities of all persons concerned herein; and they do and each of them does provide for the removal of the causes which have made these proceedings necessary."

It is to be noted, of course, that most of the statements above quoted are conclusions of law and all of said statements are necessarily predicated upon a construction of the Rehabilitation and Reinsurance Agreement, which is likewise a question of law.

We find somewhat similar language at page 116 of the Record, where the California trial court recites:

> "7. That the plan embodied in said Rehabilitation and Reinsurance Agreement, Exhibit 'A', is feasible, and that operations under said Agreement are feasible.
>
> 8. That said Rehabilitation and Reinsurance Agreement, and the plan embodied therein, are, and each of them is, fair, just, and equitable.
>
> 9. That the said Rehabilitation and Reinsurance Agreement, and the plan embodied therein, present and afford, and each of them presents and affords, a feasible method of providing, within a reasonable

time, full restoration of the benefits under the Non-Cancellable Income Policies of respondent corporation to the extent that the payment of such benefits is not initially assumed by the New Company, as described in said Rehabilitation and Reinsurance Agreement."

When the Court takes note of the fact that there is nothing in petitioner's policy (Rec. 8-18) that subordinates his rights in and to the assets of the Insurance Company to the rights of any other policy, but leaves his policy, as to corporate assets, upon the same plane as all other policies, then take note of the language of paragraph 8 just quoted, then turn to page 132 of the Record where the Rehabilitation and Reinsurance Contract gives to petitioner only twenty per cent (20%) of the benefits called for by his policy and gives other disability policies as much as ninety per cent (90%), and gives all life policies one hundred per cent (100%), although a large percentage of them contain the same disability features that are alone embodied in petitioner's policy, we believe that Your Honors will agree with us that said paragraph 8 embodies language that is very extravagant and when, after having noted the provisions of the contract relating to restoration of benefits, you notice that the trial court is willing to gaze into the uncertain, indefinite future, which is as impenetrable as a heavy London fog, and confidently assert that restoration will take place within a reasonable time, you will conclude that that Court invades the realm of speculation and uncertainty contrary to the numerous decisions of this Court.

We submit that the guess of the trial court in the instances referred to are even more pronounced than that involved in *International Harvester Company* v. *Kentucky,* just above referred to.

Another case quite in point is *Collins* v. *Kentucky,* 234 U. S. 634.

Certainly in scanning the Rehabilitation and Reinsurance Agreement with reference to restoration of benefits, men of common intelligence must necessarily guess at its meaning and effect and differ as to the possibilities of the time when, if ever, restoration will be accomplished, which brings the provisions of the Agreement in question quite within the decision of this Court. In *Connally* v. *General Construction Company*, 269 U. S. 385, where, at page 391, this Court said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Another case involving such a marked element of such uncertainty as to render a statute void, is,

*United States* v. *Cohen*, 255 U. S. 81, 92.

The subject of restoration of benefits is covered by the 14th paragraph of the Contract in question (Rec. 133), but as we point out by our analysis in the Appendix to the petition, there are so many interests and events that will give precedence to the contribution by the New Company of anything toward restoration, that it leaves the subject of restoration shrouded in the greatest of doubt. Nevertheless, this uncertainty is all that is given to petitioner in lieu of the $400 monthly that is taken away from him by this Agreement.

We submit that to say that the obligation of the policy of the petitioner has been impaired is stating the matter in the mildest of terms. If petitioner becomes disabled and needs $500 per month on which to live, he can pay his rent with $100 per month that he will receive and he will then have left the nebulous uncertainty of restoration embodied in the Rehabilitation and Reinsurance Agreement on which he and his family may eat. Possibly, but not probably, after petitioner is dead

and buried and has no personal need for disability benefits, some portion of the impaired obligation of his contract may be restored, not to him but to his heirs.

In the meantime, life policyholders with disability provisions embodied therein calling for $500 per month in case of disability, will collect $500 per month. Other straight disability policyholders, who have $500 per month policies, will, when disabled, collect ninety per cent (90%) or $450 per month.

Has the obligation of petitioner's contract been impaired?

Has petitioner been accorded the equal protection of the law?

We doubt if counsel will say No. They may argue that petitioner could have filed a claim with the Liquidator within seventy-five days of the date of the Rehabilitation and Reinsurance Agreement being approved, which days have passed years ago, inasmuch as the Order of Approval was entered December 4, 1936 (Rec. 121).

Even if such a claim were allowed for some amount the Conservator has disposed of most if not all of the assets of value of the Old Company (Rec. 117).

4. *The full faith and credit provisions of the Federal Constitution are not effective where they interfere with the sovereign rights of a sister State.*

We believe that we have shown that the California proceedings are an attempt to interfere with the sovereign rights of the State of Minnesota, and to destroy in a large part the obligation of a Minnesota contract in contravention of the laws of Minnesota, as indicated under Point III of this argument.

For the several reasons herein suggested we submit that it was error for the Illinois Courts to accord full faith and credit to the California proceedings and for

such error the judgment of the Supreme Court of Illinois should be reversed and this cause remanded to that Court with directions to treat said proceedings as void so far as petitioner is concerned.

## V.

**The insolvency of an insurance company is a breach of contract. When a Liquidator is appointed, it amounts to a termination of the contract and entitles the policy-holder to sue for all damages which he has sustained by reason of the breach.**

It clearly appears from the record that the insurance commissioner of California was appointed conservator of The Pacific Mutual Life Insurance Company of California, the Company in which the petitioner Larson owns a policy; that said Conservator proceeded to form a new Corporation and turned over all or substantially all of the assets of the old Corporation to the new Corporation, and thereupon proceeded to enter into a so-called contract of Reinsurance and Rehabilitation with the new Corporation, by the terms of which the rights of the petitioner Larson were practically destroyed.

The proposition by the above caption contended for is clearly stated in *Hobbs* v. *Occidental Life Insurance Company,* 87 Fed. (2d) 380, in language found at page 384, as follows:

> "It is well settled that upon the adjudication of insolvency and the appointment of a receiver on May 22d, the policies of Federal Reserve were terminated as enforceable obligations for their respective face amounts, and the holders became creditors each for an amount equal to the then value of his policy with the right to participate pro rata in the assets in receivership. *Lovell* v. *St. Louis Mut. Life Ins. Co.,* 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423; *Carr* v. *Hamilton,* 129 U. S. 252, 9 S. Ct. 295, 32 L. Ed. 669; *Ingersoll* v. *Missouri Valley*

*Life Ins. Co.* (C. C.) 37 F. 530; *Robinson* v. *Mutual Reserve Life Ins. Co.* (C. C.) 162 F. 794; *People* v. *Commercial Alliance Life Ins. Co.,* 154 N. Y. 95, 47 N. E. 968; *Commonwealth* v. *American Life Ins. Co.,* 162 Pa. 586, 29 A. 660, 42 Am. St. Rep. 844; *Fuller* v. *Wright,* 147 Ga. 70, 92 S. E. 873, L. R. A. 1917E, 1139; *Boyd* v. *Wright,* 148 Ga. 216, 96 S. E. 388, 1 A. L. R. 593; *Davis* v. *Amra Grotto, Inc.,* 169 Tenn. 564, 89 S. W. (2d) 754.

The right of such holders to participate pro rata in the assets in receivership could not be taken from them without their consent. *Relfe* v. *Columbia Life Ins. Co.,* 10 Mo. App. 150; *American Bonding & Casualty Co.* v. *Chicago Bonding & Ins. Co.,* 226 Ill. App. 475; *McMurray* v. *Commonwealth,* 249 Mass. 574, 114 N. E. 718."

*Roehm* v. *Horst,* 178 U. S. 1.

The Supreme Court of the United States spoke in a somewhat similar strain in *Carr* v. *Carr,* 129 U. S. 252, at page 256, as follows:

"In speaking of an insurance company that has gone into liquidation 'by that act the company becomes *civilter mortuus,* its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets.' "

In *Roehm* v. *Horst,* 178 U. S. 1, the Court deals in general with declaratory breaches of contract and the right of the other party thereto under such circumstances.

In *Evans* v. *Illinois Surety Co.,* 298 Ill. 101, the question arose as to the effect of a proceeding to dissolve a corporation wherein a receiver had been appointed and its business suspended. Speaking of an outstanding contract of suretyship, the Court, at page 112, says:

"The binding force of the contract between the company and claimant could no more be changed

by the death of the company or the appointment of a receiver than could that of an individual surety."

Other cases bearing upon this subject are,

*In re* Western, etc., 50 Fed. (2nd) 632-3.

*Gray* v. *Cavalliotis,* 276 Fed. 565-70.

*Boyd* v. *Wright,* 148 Ga. 216.

*Smith* v. *National,* 65 Minn. 283.

*In re Emmett,* 214 N. Y. 515.

*People* v. *Security, etc.,* 178 N. Y. 414.

In this discussion we are disregarding for the moment the question of the validity of the reinsurance agreement.

We think the foregoing authorities conclusively determine that a cause of action exists in the petitioner Larson not upon the contract, but for a breach of it.

What petitioner's damages are, for breach of contract, will of course arise only on a hearing on the merits. We do not therefore go into that question in this court.

As Your Honors will readily note the State Courts impaired petitioner's vested right to prove his damages if, as to him the California proceedings are valid, and did it upon the basis of the 1937 Insurance Act.

## CONCLUSION.

The hearing in the trial court was on the motion of Pacific Mutual Life Insurance Company to dissolve temporary restraining orders, dismiss the Complaint as amended, and to dismiss the suit (Rec. 190).

The Court granted all of said Motions, and held that the proceedings were barred by the prior judgment of the California Court (Rec. 193).

The Court found as a matter of equity, and by reason of the pendency of the proceedings, that any of the plaintiffs whose Non-Cancellable Income Policies are not now in force, should be permitted upon payment by them of all unpaid premiums to have such policies reinstated and reinsured, at this time, by the defendant Pacific Mutual Life Insurance Company, pursuant to the terms of said Rehabilitation Agreement, notwithstanding the fact that such policies are shown as lapsed upon the books of said Company. The payment of said premiums to be made within thirty days after said order becomes final.

The Court undoubtedly acted upon the well established doctrine that the Company, being the moving party and asking equity, must do equity.

The Supreme Court, however, reversed the last mentioned portion of the trial court's decree and affirmed it in all other particulars. This, as this Court will of course note, puts petitioner out of court in Illinois without even the right to sue for a judgment at law to recover damages for breach of his insurance contract.

We submit that said Insurance Act of 1937 is not retroactive as a matter of law, and that it was clearly error for the Illinois Courts to give it a retroactive effect and so construe it as to destroy petitioner's vested right to a preferred claim against the Illinois assets of the California Company, and that it was even more serious error to so construe said Act as denying all right on the part of petitioner to a hearing in the Superior Court of Cook County, Illinois, on the question of damages; that as construed by the Illinois Courts, said 1937 Insurance Act impairs the vested right of petitioner in violation of Section 10 of Article I of the Federal Constitution; that such construction deprives petitioner of property without due process of law in violation of the

Fifth Amendment to the Federal Constitution and Section 1 of the Fourteenth Amendment to the Federal Constitution.

We further submit that petitioner's contract, being a 1921 contract, what we have said with reference to the 1937 Code applies with equal force to the 1929 amendment.

We further submit that there is nothing in either the 1937 Act or the 1929 Amendment that precludes petitioner from maintaining an action in the courts of Illinois to establish a preferred claim against the Illinois assets of the foreign Insurance Company, and that to deny to petitioner said right is to deny him the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

We further submit that it was error on the part of both the trial Court and the Supreme Court of Illinois to give full faith and credit to the California proceedings and giving them the force of barring petitioner's right to be heard in the Illinois courts,

1. Because said proceedings were without jurisdiction of petitioner or his insurance policy or either of them.

2. Because said proceedings are contrary to the public policy of the State of Illinois, for the several reasons hereinbefore indicated.

3. Because the due process requirements of the Federal Constitution have not been complied with.

4. Because said proceedings interfere with the sovereign rights and laws of,

   a. The State of Minnesota.

   b. The State of Illinois.

Respectfully submitted,

Charles M. Haft,
*Attorney for Petitioner.*

# No. 458



IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940

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| **EMANUEL E. LARSON,** Petitioner, vs. **PACIFIC MUTUAL LIFE INSURANCE COMPANY,** Respondent. | Petition for Certiorari to the Supreme Court of Illinois. |

## REPLY BRIEF OF PETITIONER

CHARLES M. HAFT,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

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## REPLY BRIEF OF PETITIONER

MAY IT PLEASE THE COURT:

The first paragraph on page 4 of respondent's brief is a recitation of certain conclusions of law embodied in the order of the California trial court in a proceeding to which petitioner was not made a party. In fact, it appears as pointed out in our original brief that the only attempted service on petitioner was by mailing, although the judgment of the California Court operated directly upon petitioner's insurance policy which was in the State of Illinois, by reducing the amount of the liability thereon, with petitioner as a citizen of Illinois, and was entered into and became a Minnesota contract on the fifth of August, 1921. The proceedings are, therefore,

(*a*) In personam, and the California Court had no jurisdiction of petitioner's person because of lack of personal service in California, or,

(*b*) If the proceeding could be said to be one against petitioner's insurance policy and hence *in rem,* the *res* was not in the State of California, but was in the State of Illinois, and beyond the jurisdiction of the California Court.

It is true as counsel say, at page 5 of respondent's brief, that petitioner did not pay premiums on his policy to the New Company. However, as clearly appears from the Record as we pointed out in our original brief he tendered the amount of those premiums to the Old Company which, with the aid of the Commissioner created the New Company and held all of the New Company's capital stock, and it was really within the power of the New Company to have obtained those premiums if it and the Old Company so desired.

This form of payment or tender of payment was made, of course, in order that petitioner might have a chance to test out the legality of the California proceedings, before he estopped himself so to do by making premium payments to the New Company (Rec. 32).

At page 7, counsel contend that the question of preferred claim is one of local law.

Primarily, that is true, but where the Supreme Court of Illinois predicates its conclusion as to the public policy of Illinois with reference to preferred claims against the Illinois assets of a non-resident upon a statute passed many months after the institution of a suit to establish a preferred claim, and at the time of instituting that suit, the Illinois Supreme Court had held in case after case that such right to a preferred claim existed, then petitioner's right to such preferred claim was vested. Then there is raised the question, as here presented, that the statute passed after the right to the preferred claim was vested and a suit to enforce

the same instituted, is destroyed by the later statute, a question of the Federal Constitution arises which is above and aside from the local law of Illinois, and it is for this Court to determine for itself, regardless of the action of the state court, whether this later statute does or does not impair petitioner's vested right to maintain his action for a preferred claim.

In short, the state court may not predicate its decision as to petitioner's right to a preferred claim upon a statute that is unconstitutional because in violation of section 10 of Article I of the Federal Constitution, and thereby enable counsel to tell this court that it is without jurisdiction to pass upon the constitutionality of section 197 of the 1937 Insurance Code.

We do not question for a minute the propriety of this court's ruling quoted at page 8 of respondent's brief, to the effect that every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts.

However, this court did not say that the state court's determination for itself could be predicated upon a state statute that is clearly in violation of the Federal Constitution, and that is just exactly what the Supreme Court did in its opinion in this case.

Construed to have a prospective effect only, the 1937 Insurance Act is valid. Construed to have a retroactive effect and thereby destroy petitioner's vested rights clearly renders section 197, as so construed, in violation of section 10 of Article I of the Constitution, and this court has many times so held as we point out in our original brief at page 16.

With reference to what counsel have to say at page 9 *et seq.* concerning the force of *Neblett* v. *Carpenter*, 305 U. S. 297, Your Honors will, we think, note that

while the reasons presented in that proceeding to induce a ruling from Your Honors that the California proceedings impaired the obligation of insurance policy contracts did not pertain, we, nevertheless, assert with all possible modesty and without being thought egotistical that had the reasons presented in our brief and herein been then presented to Your Honors, that you would have felt disposed to have held that said California proceedings impaired the obligation of any non-cancellable disability insurance policy that was accorded but twenty per cent of insurance in the New Company; that the Old Company policy provided for payment of. It was not in that connection called to Your Honors' attention that a large percent of the life policies carried also the same disability features embodied in the policy of petitioner, and that nevertheless said policies carrying both features were accorded 100 per cent of insurance in the New Company.

It was not called to Your Honors' attention that the California Supreme Court's decision was predicated solely upon the assertion by the state of its police power and the ruling in that connection that California's police power was not subject to the contract and due process clauses of the Federal Constitution, as we point out at page 54 of our original brief in support.

It was not even urged in *Neblett* v. *Carpenter,* that any policy did not receive the equal protection of the law accorded to other policies. We submit, therefore, that when counsel say at page 9 that you held in *Neblett* v. *Carpenter* that the California proceedings "did not take the property of policyholders without due process of law, did not impair the obligation of their contracts, *and did not contravene any of their rights under the Federal Constitution,*" counsel are extravagant in their statement because as we have herein pointed out there are a number of Federal constitutional

questions that were not presented to Your Honors, and were not ruled upon by Your Honors.

Undoubtedly, the Illinois Supreme Court in giving force to the opinion of this court in *Neblett* v. *Carpenter,* did so upon the theory that the case had been fully and fairly presented to this court whereas we respectfully submit that the contrary is the fact.

For some reason, wisely perhaps, counsel do not have anything to say about section 197 of the 1937 Insurance Code impairing the obligation of contracts in violation of section 10 of Article I of the Federal Constitution. We urge that the numerous decisions of this court cited by us at pages 16 and 17 of our original brief, abundantly sustain our contention that said section 197 construed to act retrospectively and destroy petitioner's vested rights as the Supreme Court of Illinois held, violates section 10 of Article I of the Federal Constitution.

At page 11, counsel assert that the Supreme Court of Illinois could have given effect to the California proceedings as a matter of comity even though it had not been obliged to do so under the full faith and credit clause.

Counsel in making this assertion blind themselves to the fact that petitioner was not made a party to those proceedings, that he was not personally served in those proceedings, that he did not appear in those proceedings, that the proceedings are *in personam* so far as petitioner and his policy are concerned, and not *in rem,* and that even if they were *in rem,* the California court had no jurisdiction of the *res,* which was in Illinois; that counsel cannot ask recognition of the California proceedings on the basis of class representation because it does not appear that any policyholder appearing in the California proceedings was situated as

is and was petitioner and his insurance policy. Again, at page 11, counsel say petitioner also asserts numerous violations of the Constitution of California and the Constitution of Illinois. These contentions present no federal questions, etc. The purpose of indicating to Your Honors wherein the California proceedings violated the laws and constitution of the State of Illinois was to indicate why it was error for the Illinois courts to accord full faith and credit to the California proceedings, which were and are as we pointed out in our original brief contrary to the public policy of Illinois, as evidenced by the decisions and constitutional provisions to which we there made reference.

Counsel's contention, at page 11, that no contention was made in the Supreme Court of Illinois that petitioner was deprived of a vested right in violation of section 10 of Article I is in a sense both right and wrong.

The hearing in the trial court was on a motion to dismiss, which did not present the question of the constitutionality of section 197 in the Insurance Act of 1937 (Rec. 191). No ruling of the trial court on that question was made. The question arose for the first time in the Illinois Supreme Court when we cited to the Court its many decisions holding that an Illinois citizen was entitled to a preferred claim against the assets in Illinois of a non-resident, which decisions are referred to in our supporting brief at pages 14 and 24, *et seq.*, and as a basis to defeat that preferred claim the Illinois court in its opinion in *Larson* v. *Pacific Mutual Life Insurance Company*, 373 Ill. at page 623, invoked section 197 of the Insurance Code of 1937, which was enacted many months after August 11, 1936, when the suit on which the present proceedings are predicated was instituted.

In asserting, at page 11, that petitioner can have no vested right in a remedy, counsel so far as the facts in this case are concerned are wrong, although the rule announced as a general proposition pertains to the extent that a remedy may be modified but not destroyed. Here, according to the Supreme Court of Illinois, the vested right of petitioner to a preferred claim was destroyed by section 197 of the Insurance Code of 1937. This Court held in *Walker* v. *Whitehead,* 83 U. S. 314, that after a cause of action has become vested, any act that impairs that vested right violates section 10 of Article I of the Federal Constitution.

The last mentioned case and many others bearing upon this subject are found at pages 16 and 17 of our supporting brief.

Had all policies been subjected to a pro rata reduction, undoubtedly the obligation of petitioner's policy would not have been impaired, because his interest in the company assets would be relatively the same as before. But when life policies are accorded 100 per cent of insurance in the New Company and other disability policies are accorded as high as ninety per cent, although petitioner has paid all premiums called for by his policy since August 5, 1921, and some disability policies are accorded ninety per cent of insurance in the New Company, although they had paid premiums only since 1935, something is wrong, something is being taken from petitioner's policy and given to those receiving policies providing for higher percentages.

Petitioner, under the terms of his policy, was entitled to the same percentage of insurance that any other policy of the same or any other type was entitled to receive.

When we consider that with the approval of the Cal-

ifornia trial court, the Rehabilitation and Reinsurance Agreement accords to all life policies, even those carrying disability features, 100 per cent of insurance in the New Company and to disability policies the various percentages shown at page 132 of the Record, and we add all of the percentages together, we get 410, and when we divide that by 7 the aggregate of the different number of percentages, we get practically sixty per cent as the amount which every policyholder would receive in insurance in the New Company on a pro rata basis. It results, that when petitioner's policy is reduced to twenty per cent in order that other policies shall receive 100 per cent or ninety per cent petitioner's policy is impaired for the benefit of other policies receiving percentages in excess of twenty.

Petitioner's policy is Number 4619175 and falls within the twenty per cent class, and had petitioner been accorded sixty per cent of insurance in the New Company, he would have a policy entitling him to a disability benefit of $300 per month instead of $100 per month, which is allotted to him on the twenty per cent basis.

We seriously doubt if in the hearing of *Neblett* v. *Carpenter,* this viewpoint was presented to Your Honors for your consideration, and we confidently believe that had it been Your Honors would have adopted the view that the obligation of petitioner's contract had been impaired. Of course, we appreciate that it was not to the interest of Neblett, a life policyholder, or any disability policyholders accorded in excess of sixty per cent of insurance in the New Company that they possessed in the Old, to present to this Court a situation that would mean that they, along with all other policyholders, petitioner included, should be put on a pro rata liquidation basis as they were in the Old Company and receive sixty per cent of insurance in the New Company.

It will be noted, however, that the one life policy and the three disability policies all make the same argument in *Neblett* v. *Carpenter,* 305 U. S. 297, indicating that their interests and purposes are substantially identical, whatever those interests and purposes may be.

We submit that not only do the California proceedings impair the obligation of petitioner's policy contract, but they also deny to petitioner the equal protection of the law, a proposition that was not presented to Your Honors in the *Neblett* case so far as we can glean from your opinion therein.

All types of policies were given an opportunity to file a claim for such damages as they might contend to be due to them on account of the provisions of the Rehabilitation and Reinsurance Agreement being given effect. So far they were accorded equal protection of the law, but there the equal protection ceases, and we have a new situation presenting only the question of the amount of insurance in the New Company that shall be given to each policyholder.

When every policyholder in the Old Company has an equal right with every other policyholder, to have the amount coming due under the terms of his policy paid in full or to such an extent as the assets of the Company would extend when applied pro rata to all policies, and then by the Agreement in question one policyholder, who has a disability policy coupled with a life feature, receives 100 per cent, of insurance in the New Company and your petitioner, whose policy covers a disability feature only, is accorded but twenty per cent, we submit that there is no escaping the conclusion that petitioner has been denied the equal protection of the law.

In *Larson* v. *Pacific Mutual Life Insurance Company,* 373 Ill. the Court, at page 321, says:

"On this appeal plaintiffs say the questions presented and decided by the Supreme Court of California and the Supreme Court of the United States in reference to the due process and contract clauses of the Federal constitution are not binding on them. The theory advanced is that since the plaintiffs were not personally served and did not appear in the court of California, that court was without jurisdiction over them. In reply it is contended that the doctrine of class representation applies. As noted, several of the intervenors in the court proceedings in California were holders of non-can policies identical, as to rights, with plaintiffs' policies."

This assertion omits to note the controlling factor that in this court and in the California Supreme Court the equality of rights among all policyholders which pertained before the hearing in the trial court was there changed to numerous and varying inequalities, ranging from 100 per cent, for life policies both with and without disability features, to as low as 20 per cent for some disability policies as appears from the record (p. 132).

We submit that the mere fact that some disability policyholder had intervened in the California proceedings would by no means make those proceedings in any sense a class suit. For example, if those disability non-can policyholders who intervened held policies of the ninety per cent type shown at page 132 of the Record, they would gain a very material advantage by having other disability policies cut down to twenty per cent so far as the insurance in the New Company is concerned. A reduction of these policies from 100 per cent to twenty per cent would be a vast benefit to the ninety per cent type at the expense of the twenty per cent type.

If the New Company were to have been liquidated

at the time the Insurance Commissioner filed his petition in the California court, as elsewhere indicated and on the basis of figures embodied in the Rehabilitation and Reinsurance Agreement (Rec. 132) each policyholder would receive sixty per cent, but if that same liquidation were to take place upon the basis of the percentages involved in the Rehabilitation and Reinsurance Agreement, all persons who took out disability policies in 1932 and thereafter would receive ninety per cent or thirty per cent more than they would have received on a pro rata basis. It results that this last mentioned class of policyholders would earnestly desire that the Rehabilitation and Reinsurance Agreement be sustained.

In short, any disability policyholder receiving more than sixty per cent in the New Company would be advantaged by said Agreement, and even those who received fifty-five per cent, forty-five per cent or thirty-five per cent would gain financially by having the insurance of petitioner and those in like position reduced to twenty per cent.

We therefore respectfully submit that there could be no class representation in the California proceedings, whether in the trial court, the California Supreme Court or in this court in *Neblett* v. *Carpenter,* unless the non-can disability policyholders appearing were by the Rehabilitation and Reinsurance Agreement put in the twenty per cent class.

Respondent has invoked the class representation theory and before it can expect to have this court apply it, it must show that the non-can policyholders appearing before Your Honors in *Neblett* v. *Carpenter,* were policyholders placed by the Rehabilitation and Reinsurance Agreement in the twenty per cent class.

This subject is discussed in *Commercial Publishing*

*Company* v. *Beckwith,* 188 U. S. 567, where Your Honors at page 573, say:

> "It is to be borne in mind that upon plaintiff in error rested the burden of establishing that the decrees of sale were not given the due effect to which they were entitled, and if it has failed to sustain such burden this court cannot say that error was committed by the judgment below rendered."

Then, in speaking of a certain decree involved, at page 576, you say:

> "Beckwith nowhere appears to have been an active participant in obtaining such decree or assenting thereto. It does not even appear that at the time of the entry of the decree he was a party to any of the actions which had been consolidated, for it cannot in reason be inferred from the mere circumstance that nearly two years after, on the entry of the final decree he is referred to therein as being a cross-complainant in one of the actions seeking to enforce a lien the nature of which was not disclosed."

It nowhere and in no way appears that of the several policyholders appearing in the California proceedings as indicated at pages 50 to 52 inclusive of the record, any thereof held a policy which, by the terms of the Rehabilitation and Reinsurance Agreement, was reduced to twenty per cent in New Company insurance based upon the insurance called for by his old policy.

It does not appear that the owners of any policies appearing in the California proceedings held Minnesota contracts embodying therein the law of Minnesota to the effect that no change should be made in the policy without the assent of the insured.

It does not appear that any of the policyholders appearing in the California proceedings were so disabled physically as to be unable to obtain new insurance in any other Company.

It does not appear that any policyholders appearing in the California proceedings did not in fact receive notice of the pendency of said proceedings provided by court order to be mailed to policyholders.

It does appear (Rec. 2) that petitioner holds a Minnesota policy.

It does appear (Rec. 183) that petitioner is so disabled physically as to be unable to procure new insurance in another company.

It does appear that petitioner did not in fact receive the notice provided by court order to be mailed to all policyholders (Rec. 162).

At page 10 counsel cite *Hartford Life Insurance Company* v. *Ibs,* 237 U. S. 662; *Hartford Life Insurance Company* v. *Barber,* 245 U. S. 146, and *Royal Arcanum* v. *Green,* 237 U. S. 531, as sustaining their contention that petitioner is bound by the California proceedings upon the theory of class suit.

The first of these cases involves the right of the Company to make assessments to increase a mortuary fund perpetuated to pay death claims. It appears there that all of the certificate holders were identically situated and stood on the same plane. There was no chance for conflicting interests as between them because none was advantaged to the detriment of another. There is no room for an argument that a number of certificate holders could not speak for others as well as themselves.

The second case was substantially identical with the first.

The third case is different from the other two in that under the statute pursuant to which the Royal Arcanum was organized, the corporation was made the representative of all its members, and the court very

naturally holds that its members were bound in proceedings to which the corporate entity was a party.

In the case here presented however as we elsewhere point out, the fact that one is a policyholder does not have any bearing upon his rights and interests being identical with another policyholder as such, but numerous classes are involved. It might well be said that in the California proceedings a life policyholder or a number of them could stand as representatives of the class of life policyholders.

When it comes however to non-cancellable disability policyholders, the Rehabilitation and Reinsurance Agreement places them upon so many different planes that a disability policyholder cannot be said to be representative of all other disability policyholders, because of the radical differences in their situation and in their rights.

It might well be, all other questions aside that a non-cancellable disability policyholder who is accorded a policy in the New Company for twenty per cent of the amount of the old policy held by him, could be said to speak for other members of that class, but certainly a non-cancellable disability policyholder receiving insurance in the New Company for ninety per cent of his Old Company insurance could not by any means be said to be upon the same plane as the twenty per cent policyholder.

In short, the cases cited by counsel portray an equality of interest as to all certificate holders but the California proceedings involving the Rehabilitation and Reinsurance Agreement and the approval thereof, clearly establish such marked diversity of interests that no random number of any policyholders described as holding life policies or non-cancellable disability policies, could in anywise be said to have identity of interests

with all policyholders. Clearly respondent did not make a record disclosing identity of interests as between any of those appearing in the court proceedings and petitioner in this case, and in the absence of such showing the California proceedings are not entitled to full faith and credit upon any theory of the case. However, if we are right, as we are convinced we are in our contention that a proceeding to fix the liability upon a policy of each individual member is a proceeding in *personam* requiring personal service, leaving such proceedings lacking in jurisdiction, but even if a proceeding *in rem,* the *res* was not present in California and the proceedings were without jurisdiction for that reason.

It is so glaringly apparent as not to admit of argument that if the Old Company was insolvent, and if all policyholders were dealt with on a pro rata basis, none of them would receive 100 per cent. It results that the procedure adopted by the Rehabilitation and Reinsurance Agreement is to take from non-cancellable disability policies varying percentages of what they would receive if they were put on a pro rata basis with all other policies, and add to what the life policies would receive if the all were treated alike, so that with such addition the favored life policies which, to a great extent are also disability policies, will receive 100 per cent, in the New Company as against twenty per cent which will be received by petitioner.

At page 302 of your opinion in *Neblett* v. *Carpenter,* 305 U. S. 297, you take note of a number of questions raised before you which were essentially state questions and over which you consequently had no jurisdiction. The portion of the opinion which distinctly bears upon the record here presented is found at page 303, where you say:

> "The petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation

adopted by the Commissioner and approved by the Court, even if authorized by the Insurance Code, denies them due process and impairs the obligation of their policy contracts. Because of these contentions, we granted certiorari."

It is to be noted, however, that the equal protection of the law provision of the Federal Constitution was not invoked and this court was given no opportunity to rule thereon or on the proposition here presented that the police power of California is subject to the applicable provisions of the Federal Constitution. The life policies were granted the option to accept 100 per cent of insurance in the New Company or file claims with the Liquidator of the Old Company, and that was true as to policies which also carry along with the life feature the identical features that the policy of petitioner embodies.

When it comes to the option that is accorded to petitioner, his option is not to receive 100 per cent of insurance in the New Company or file a claim, but to receive only twenty per cent or file a claim. Certainly, it cannot be seriously contended that petitioner received the same protection by the proceedings in question as do the life policies. In order to receive equal protection he should have been given an option to take 100 per cent of insurance in the New Company or file a claim.

In a measure the same proposition applies as between petitioner's policy which may obtain only twenty per cent of new insurance and other disability policies which may obtain varying amounts in excess of twenty per cent ranging as high as ninety per cent. The principle is the same as in the case of the life policy, but the degree of lack of equal protection varies.

The Old Company policy accorded to all types of insurance 100 per cent and thereby accorded to all policies, including the disability policies now only receiving twenty per cent the same or equal protection of the law accorded to all others.

At page 304 of your opinion, in *Neblett* v. *Carpenter*, 305 U. S. 297, you say:

> "The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the state law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their contention that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds."

Petitioner is not here insisting that he was entitled to liquidation. He is, however, insisting that he is entitled to the equal protection of the law, and that if certain policies receive 100 per cent or fifty-five per cent or sixty-five per cent (Rec. 132), it stands to reason and requires no evidence outside of the Rehabilitation and Reinsurance Agreement itself to establish the fact that had all policies received their pro rata share of the old company assets in the form of new company insurance, petitioner would have received about sixty per cent of new insurance.

If we are to take the life policies and petitioner's policy alone to illustrate the thought which we desire to press upon the attention of the court, and if we were to take the 100 per cent, accorded the life policies, and the twenty per cent accorded petitioner under his disability policy and add them together and divide them by two, we would get sixty per cent as the amount which petitioner would receive were he accorded the equal protection of the law guaranteed to him by the Federal Constitution, and the life policies would receive the

same amount, and in consequence thereof, both would receive the equal protection of the law.

At page 305 of your opinion you say,

> "It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is *per se* an impairment of the obligation of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new noncancelable policies which are to be substituted for the old ones and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policyholder."

By the terms of the Old Company policies they were all treated alike. None was given a greater percentage of what his contract called for, than any other. The agreement complained of takes from certain policies and adds that to the pro rata which other policies were entitled to on the basis of an equal division of assets, to which all policies were entitled to by their terms and by law.

We make no contention that the life policyholder was compelled to accept new insurance. He, like petitioner might file his claim with the liquidator. No fault is found on account of taking new insurance in the New Company. It is the amount of such insurance accorded to petitioner, compared to that that is accorded to others of which the complaint is made.

As one of the reasons why due faith and credit should not be given to the California proceedings, we raise the point that those proceedings violated the Federal Constitution because the California decision was based solely upon the exercise by the State of its police power, as is evidenced by what the California Court said in *Carpenter* v. *Pacific Mutual Life Insurance Company*, 10 Cal. (2d) 307, at 331, as follows:

"The Old Company was powerless to change the existing non-can policy. The contract and due process clauses prohibited the Company from making any changes therein but these prohibitions do not apply to the state acting under its police powers."

This Court held to the contrary in *Harris Power Association* v. *Commission,* 294 U. S. 523, and in numerous other cases, thereby debarring the California proceedings from the provisions of the due faith and credit provisions of the Federal Constitution. This question was not presented in *Neblett* v. *Carpenter.*

For the several reasons herein and in our original brief suggested, we again respectfully submit that this court should order the writ of certiorari to issue, and thereupon review and reverse the proceedings of the Illinois Courts.

Respectfully submitted,

CHARLES M. HAFT,
*Attorney for Petitioner.*

IN THE

# Supreme Court of the United States

October Term, 1940

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## No. 458.

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EMANUEL E. LARSON,

*Petitioner.*

*vs.*

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

*Respondent.*

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**On petition for Writ of Certiorari to the Supreme Court of the State of Illinois.**

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**BRIEF AND ARGUMENT OF RESPONDENT, PACIFIC MUTUAL LIFE INSURANCE COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.**

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Francis X. Busch
Orville J. Taylor
Whitney Campbell
*Counsel for Respondent.*

McCORMICK AND HENDERSON, INC., CHICAGO

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*To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:*

Pacific Mutual Life Insurance Company, respondent to the petition of Emanuel E. Larson, petitioner herein, for writ of certiorari to the Supreme Court of the State of Illinois, in this matter, opposes the granting of such writ;

and in support of such opposition we respectfully submit the following brief and argument in its behalf.

## OPINIONS BELOW.

The opinion of the Supreme Court of Illinois in this cause is reported in 373 Illinois at page 614. It is also set forth in full in the Transcript at page 201 to 209.

The Superior Court of Cook County, Illinois, filed no written opinion.

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## STATEMENT OF FACTS.

Since neither the petition nor petitioner's brief contain a concise statement of the facts of the case, we believe it desirable to set forth a brief outline of the important facts.

A complaint in chancery (Tr. 1 to 8) was filed August 11, 1936, in the Superior Court of Cook County, Illinois, by the petitioner, Larson, and others against The Pacific Mutual Life Insurance Company of California (old company), Chicago Title and Trust Company, North Shore Golf Club, and Pacific Mutual Life Insurance Company (new company), the respondent. The complaint alleged that each of the plaintiffs was the holder of a non-cancellable accident and health policy issued by the old company, a California insurance company (Tr. 2).

At the time this complaint was filed there was pending in the Superior Court of California, in and for the County of Los Angeles, a statutory insolvency proceeding against the old company instituted by the Insurance Commissioner of California pursuant to the California Insurance Code. The Insurance Commissioner of California had taken title to all assets of the old company as statutory conservator.

Pursuant to a plan of rehabilitation and reinsurance approved by the California court, and later reapproved after full hearing, the Insurance Commissioner of California had also organized the new company (respondent) and had transferred most of the old company's assets to the new company.

Among the assets transferred from the Insurance Commissioner as conservator to the new company was a mortgage note in the sum of $250,000 made by North Shore Golf Club. That note was in Illinois, being held in an escrow account at the Chicago Title and Trust Company (Tr. 6).

It was the theory of the complaint filed by the petitioner and others (a) that the rehabilitation proceeding in the California court and the agreement of rehabilitation and reinsurance approved by the California court were unconstitutional and void either in their entirety or at least as to the plaintiffs, (b) that the Superior Court of Cook County, Illinois, should appoint a receiver for the mortgage note physically present in Illinois, which had belonged to the old company but which had been transferred to the new company by the conservator in the rehabilitation proceeding, and (c) that the receiver so appointed should continue to hold said note and make collections thereon throughout the life of the policies held by the plaintiffs and employ the funds so created to satisfy the claims of the plaintiffs when and if claims might arise upon their policies.

The respondent filed several motions directed to the complaint as amended. Among these was a motion to dismiss the suit (Tr. 191) on the ground that the cause of action, if any, was barred by the order of the California court entered in the rehabilitation proceeding. An authenticated copy of the California order was filed with the motion (Tr. 111 to 149).

The order of the California court adjudged and decreed: that all parties in interest had been given reasonable and proper notice of the proceedings and a right and opportunity to be heard upon all matters therein adjudicated; that all policyholders, creditors and stockholders of the old company are, by representation or otherwise, parties to the proceeding and bound by the terms of the order; that the rehabilitation and reinsurance agreement makes adequate provision for each and every class of policyholders, creditors and stockholders, and does not discriminate unfairly against any class of policyholders, creditors or stockholders; that the old company was insolvent as of December 31, 1935, and as of July 22, 1936, within the purview of the Insurance Code of California; that the rehabilitation and reinsurance agreement and the plan embodied therein are fair, just and equitable; that the transfers of assets of the old company to the new company are approved; and that the rehabilitation and reinsurance agreement is approved and its execution by the Insurance Commissioner authorized and directed. The rehabilitation and reinsurance agreement was made a part of the order of the California court (Tr. 122 to 149).

We do not deem it necessary to burden the court with a statement of the plan of rehabilitation and reinsurance or with a statement of further facts relating to the California proceeding. Those facts have been before this court, and are reported in *Neblett* v. *Carpenter,* 305 U. S. 297, *Carpenter* v. *The Pacific Mutual Life Insurance Company of California,* 10 Cal. (2d) 307, and *Larson* v. *The Pacific Mutual Life Insurance Company of California,* 373 Ill. 614 (Tr. 201 to 209).

By the terms of the rehabilitation and reinsurance agreement, the respondent reinsured the policy of the petitioner

—and all other policies of the old company—subject to the payment of premiums to the respondent. Petitioner, however, elected not to pay premiums to the respondent. His policy thereby lapsed upon the books of the respondent (Tr. 38).

On July 3, 1939, the Superior Court of Cook County, Illinois, entered its order in this cause. By its order (Tr. 193 to 195) the court found that the petitioner and other plaintiffs were bound by the order of the California court and by the terms and conditions of the rehabilitation and reinsurance agreement embodied in the order of the California court. By its order the Superior Court of Cook County, Illinois, denied the petitioner's motion for the appointment of a receiver of the asset present in Illinois and sustained the respondent's motion to dismiss the suit on the ground that the cause of action, if any, is barred by the order of the California court. The trial court, however, attached a condition to its dismissal of the suit. It ordered the respondent to reinstate the lapsed policy of the petitioner upon the payment of all unpaid premiums, and it required the respondent to file a bond guaranteeing such reinstatement as a condition to the dissolution of temporary restraining orders previously entered.

Upon appeal by the respondent and cross-appeal by the petitioner, the Supreme Court of Illinois reversed those parts of the order of the Superior Court which directed the respondent to reinstate the lapsed policy of the petitioner and which imposed a bond requirement upon the respondent, and affirmed all other parts of the order (Tr. 209).

## SUMMARY OF ARGUMENT.

The question decided by the Supreme Court of Illinois in this case was whether the public policy of Illinois authorizes a preferential payment to a local creditor of an insolvent foreign insurance company out of property located in Illinois. That was a question of local law which the Supreme Court of the United States will not review.

The only federal questions considered or involved in the decision of the Supreme Court of Illinois were the validity of the proceedings in the courts of California relating to the rehabilitation of The Pacific Mutual Life Insurance Company of California, and the application of the full faith and credit clause of the Federal Constitution. Those questions are not open to doubt in view of the decisions of this court in *Neblett* v. *Carpenter,* 305 U. S. 297, and *Clark* v. *Williard,* 292 U. S. 112, both of which decisions were followed.

# ARGUMENT.

## I.

**THE QUESTION DECIDED BY THE SUPREME COURT OF ILLINOIS PERTAINS TO THE LOCAL LAW OF THE STATE OF ILLINOIS AND IS NOT A MATTER WHICH THE SUPREME COURT OF THE UNITED STATES WILL REVIEW.**

This proceeding was brought by the petitioner and several other Illinois policyholders of a California insurance company in an effort to obtain an equitable attachment of assets in Illinois, through the appointment of a receiver, while a statutory insolvency proceeding was pending in the domiciliary state, in order that the petitioner and other plaintiffs might procure for themselves treatment perferential to that available to all other policyholders of the same class wherever resident. The petitioner seeks a review of a decision of the Supreme Court of Illinois denying him preferential treatment. Petitioner does not contend that he has been denied any right whatsoever that was accorded to other policyholders of the same class.

In *Clark* v. *Williard,* 292 U. S. 112, this court held that the question of whether attachments of this character shall have preference over the title of the charter liquidator is a question of local law of the particular state, and reasserted the familiar principle that the highest court of the state is the ultimate authority in the determination of the local law.

In that case this court said (292 U. S. at p. 123):

> "Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority."

In the same opinion the court said (292 U. S. at p. 129):

> "To resume: The Supreme Court of Montana will determine whether there is any local policy whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution."

When the *Clark* v. *Williard* case again came before this court (294 U. S. 211) the Supreme Court of Montana had determined that there was a state policy permitting preferences for local creditors. In again recognizing the final authority of the Supreme Court of Montana on the question of local law this court said (294 U. S. at p. 213):

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts."

Accordingly, the Supreme Court of Illinois in this case determined the public policy of Illinois by an examination of its statutes. It found a policy contrary to that of Montana. It found that the law of Illinois does not authorize preferential payments to a local creditor of an insolvent foreign insurance company out of property located in Illinois. After reviewing the principles of *Clark* v. *Williard,* the Supreme Court of Illinois said (Tr. 208):

> "The public policy of this State has been prescribed by legislative enactment. * * * There is no provision in any of the sections of the code which authorizes a preferential payment to a local creditor out of the property located in this State."

The Supreme Court of Illinois having expressly decided a question which this court has characterized as a question solely of local law, the petitioner is without standing in requesting this court to review that determination.

## II.

THE ONLY FEDERAL QUESTIONS CONSIDERED OR INVOLVED IN THE DECISION OF THE SUPREME COURT OF ILLINOIS ARE NOT OPEN TO DOUBT IN VIEW OF THE DECISIONS OF THIS COURT IN NEBLETT V. CARPENTER, 305 U. S. 297, AND CLARK V. WILLIARD, 292 U. S. 112, BOTH OF WHICH DECISIONS WERE FOLLOWED.

The petitioner contended in the Supreme Court of Illinois and contends here that the California rehabilitation proceedings deprived him of his property without due process of law or impaired the obligation of his contract, in violation of his rights under the Federal Constitution.

These identical questions were considered by this court in *Neblett* v. *Carpenter,* 305 U. S. 297, which affirmed the decision of the Supreme Court of California in *Carpenter* v. *The Pacific Mutual Life Insurance Company of California,* 10 Cal. (2d) 307. In that case this court reviewed the California rehabilitation proceeding of which the petitioner here complains. The petitioners in *Neblett* v. *Carpenter* included several holders of non-cancellable accident and health policies of the old company, the very type of policy held by the petitioner here.

In *Neblett* v. *Carpenter,* this court held that the proceeding taken in California pursuant to the Insurance Code of California did not take the property of policyholders without due process of law, did not impair the obligations of their contracts, and did not contravene any of their rights under the Federal Constitution.

In disposing of petitioner's contention that the California proceedings were invalid under the Federal Constitution, the Supreme Court of Illinois treated the decision of this court in *Neblett* v. *Carpenter* as the conclusive authority. Furthermore, by reason of the fact that the California pro-

ceeding was a class suit, the Supreme Court of Illinois held that the orders affirmed by *Neblett* v. *Carpenter* were adjudications binding upon this petitioner (*Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662, *Hartford Life Insurance Co.* v. *Barber,* 245 U. S. 146; *Royal Arcanum* v. *Green,* 237 U. S. 531).

Petitioner also asserts (petitioner's brief p. 6) that the California proceeding violated the equal protection clause of the Federal Constitution. He fails, however, to state any facts which present a question under that clause.

In his contentions regarding the validity of the California proceedings, the petitioner is asking this court to review and reverse the Supreme Court of Illinois because it followed the decision rendered by this court as to the same proceedings in *Neblett* v. *Carpenter.*

Throughout petitioner's brief it is also contended that the Supreme Court of Illinois should not have accorded full faith and credit to the California proceedings. Petitioner is not complaining of a denial of full faith and credit—but is complaining because full faith and credit was granted.

The application of the full faith and credit clause of the Federal Constitution to cases of this character was made plain by the decision of this court in *Clark* v. *Williard,* 292 U. S. 112. The principles of that case were not misconceived by the Supreme Court of Illinois. The Illinois court said (Tr. 208):

> "In *Clark* v. *Williard,* 292 U. S. 112, 78 L. ed. 1160, it was held that if one State has a public policy which permits a preferential payment to the local creditors of an insolvent insurance company, then the title of the liquidators appointed in the State of domicile is, as to the property in the other State, subordinated to the claims of the resident creditors of the latter State. If

> the public policy of the State be the opposite, then, as a necessary corollary, it would follow that the State courts must, under the full faith and credit clause, accord superiority of title to the statutory liquidator appointed in the State of domicile."

After determining that the law of Illinois does not authorize preferential payments to local creditors out of the local assets of an insolvent foreign insurance company, the Supreme Court of Illinois applied the principles of *Clark* v. *Williard* and held that full faith and credit must be given to the California proceedings (Tr. 209). The Supreme Court of Illinois could, of course, have given effect to the California proceedings as a matter of comity, even though it had not been obliged to do so under the full faith and credit clause.

In his contention under the full faith and credit clause, the petitioner is asking this court to review and reverse the Supreme Court of Illinois because it expressly followed the doctrine pronounced by this court in *Clark* v. *Williard*.

These are the only questions of federal law which were considered or involved in the decision of the Supreme Court of Illinois.

Among the many contentions made in the petition and the brief in support thereof is the contention that the determination of Illinois law made by the Supreme Court of Illinois deprives petitioner of some vested right to a preference, in violation of the Constitution of the United States (petitioner's brief, p. 12). In answer to that contention we deem it necessary to say only: (a) that no such contention was made in the Supreme Court of Illinois, and (b) that petitioner can have no vested right in a remedy.

Petitioner also asserts numerous violations of the Constitution of California and the Constitution of Illinois. These

contentions present no federal question and have been answered adversely to the position of the petitioner by the Supreme Court of California in *Carpenter* v. *The Pacific Mutual Life Insurance Company of California,* 10 Cal. (2d) 307, and by the Supreme Court of Illinois in this case.

## CONCLUSION.

Neither the petition nor the brief in support thereof state any reason for a review of the decision of the Supreme Court of Illinois. The question decided was one of local law. In so far as questions of federal law were considered or involved in the decision such questions were decided in conformity with decisions of this court which were directly applicable thereto.

The writ of certiorari should be denied.

Respectfully submitted,

Francis X. Busch
Orville J. Taylor
Whitney Campbell
*Counsel for Pacific Mutual Life Insurance Company, Respondent.*